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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

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UNITED SERVICES AUTOMOBILE) (
ASSOCIATION

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) (CIVIL ACTION NO.

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VS.) (2:18-CV-366-JRG

6

) (MARSHALL, TEXAS
JANUARY 7, 2020

7

WELLS FARGO BANK, N.A.) (12:44 P.M.

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TRANSCRIPT OF JURY TRIAL

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AFTERNOON SESSION

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BEFORE THE HONORABLE CHIEF JUDGE RODNEY GILSTRAP,

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UNITED STATES DISTRICT JUDGE

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25

P R O C E E D I N G S

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Be seated, please.

Mr. Rowles, are you prepared to continue with your examination of the witness?

MR. ROWLES: We're ready to proceed, Your Honor.

THE COURT: All right. Then let's bring in the jury.

COURT SECURITY OFFICER: All rise.

(Jury in.)

THE COURT: Welcome back, ladies and gentlemen. Please be seated.

We will continue with the direct examination of Dr. Tom Conte by the Plaintiff. Mr. Rowles, you may continue.

MR. ROWLES: Thank you, Your Honor.

TOM CONTE, PH.D., PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

DIRECT EXAMINATION CONTINUED

BY MR. ROWLES:

Q. Good afternoon, Professor Conte.

A. Good afternoon.

Q. Before the lunch break we were about to get into the '605 patent, Claim 1; is that right?

A. That's correct.

12:46:03 1 Q. And so could you describe generally Claim 1 of the '605
12:46:08 2 patent?

12:46:08 3 A. So what I've shown on the left here is the way it
12:46:14 4 appears in your juror notebooks, and on the right, again,
12:46:17 5 is a table where I made it larger and labeled it A
12:46:23 6 through O.

12:46:23 7 Q. And Element B there mentions a portable device; do you
12:46:28 8 see that?

12:46:29 9 A. I see that, yes.

12:46:29 10 Q. Does Claim 1 of the '605 patent require a mobile phone?

12:46:33 11 A. No, it does not.

12:46:34 12 Q. Do any of the asserted claims of the USAA patents
12:46:40 13 require a mobile phone?

12:46:40 14 A. No, they do not require that, no.

12:46:42 15 Q. What's the first -- well, let me -- let me say this:

12:46:46 16 What's the correspondence between Claim 1 of the '605
12:46:50 17 patent and the '681 patent, Claim 12 analysis, that we
12:46:54 18 talked about before lunch?

12:46:56 19 A. Well, I'm showing it here. You can see that A, B, C,
12:47:03 20 and D correspond between both of the claims. So does E.
12:47:11 21 F in Claim 12 is broken into two pieces, and Claim 1 of the
12:47:15 22 '605 patent, that would be F and G.

12:47:21 23 G in Claim 12 of the '681 is now H in the '605.

12:47:28 24 And then I is a little more wordy, but it's, in essence,
12:47:33 25 the same element as I and J in the -- in Claim 1 of the

12:47:39 1 '605.

12:47:39 2 Q. So are Elements A through J of Claim 1 of the '605
12:47:42 3 patent present in the Wells Fargo system?

12:47:44 4 A. They are, although that's only half the claim, so...

12:47:49 5 Q. And as to Elements A through J, is there any dispute
12:47:53 6 about that?

12:47:53 7 A. No, there is no dispute.

12:47:55 8 Q. And so what are the remaining elements of Claim 1?

12:47:58 9 A. So there is Element K, and then there's Element L, M,
12:48:06 10 N, and O, and K, if you put together the evidence that I've
12:48:12 11 shown for Element B and -- and J in the -- I'm sorry,
12:48:19 12 Element B -- let me just go by the coloring.

12:48:26 13 So K and O match B and J in the Claim 12 of the
12:48:30 14 '681.

12:48:30 15 And then the claim elements L and M in Claim 1 of
12:48:39 16 the '605 I can show the same evidence as I showed in
12:48:42 17 Claim H of the '681.

12:48:45 18 And then, finally, there is this generating a log
12:48:49 19 file for deposit, we saw that, and that was K in Claim 12
12:48:55 20 of the '681. It's now also in N of Claim 1.

12:49:00 21 Q. And so Claim 1 of the '605 patent also has one of these
12:49:03 22 confirming that the deposit can go forward limitations; is
12:49:07 23 that right?

12:49:07 24 A. That's correct.

12:49:07 25 Q. Are you relying on the same evidence for this claim as

12:49:10 1 you did for the '681 patent earlier?

12:49:13 2 A. I am.

12:49:14 3 Q. But is it your understanding that there's not actually
12:49:16 4 any dispute about that confirming element in Claim 1 of the
12:49:20 5 '605 patent?

12:49:20 6 A. Yes, that's my understanding.

12:49:22 7 Q. So let me ask, are Elements K through O of Claim 1
12:49:28 8 present in the Wells Fargo system?

12:49:29 9 A. They are. I prepared this presentation, and I should
12:49:31 10 have put a checkmark on O, as well.

12:49:36 11 Q. So what -- what's left in the '605 patent to talk
12:49:39 12 about?

12:49:40 13 A. We have some dependent claims to speak about, 13, 14,
12:49:44 14 22, 3, and 11.

12:49:46 15 Q. So could you speak first about Claims 3 and 14 of the
12:49:53 16 '605 patent? What do those dependent claims require?

12:49:56 17 A. 3 and 14 are worded the same, but 3 refers to Claim 1,
12:50:01 18 and 14 to Claim 12. And these are the -- the elements that
12:50:04 19 talk about the system configured to perform the update
12:50:08 20 after the system determines that some mark or signature is
12:50:12 21 present in an endorsement location on the backside of the
12:50:15 22 check in the electronic images.

12:50:18 23 Q. And did you find that functionality in the Wells Fargo
12:50:20 24 system?

12:50:20 25 A. I did, both in the code and also in experimentation,

12:50:25 1 and you see that here.

12:50:26 2 Q. So are Claims 3 and 14 of the '605 patent present in
12:50:32 3 the Wells Fargo system?

12:50:32 4 A. They are.

12:50:33 5 Q. And what does Claim 13 of the '605 patent require?

12:50:38 6 A. It requires, the optical character recognition includes
12:50:41 7 comparing the determined amount to an amount indicated by
12:50:44 8 the customer.

12:50:45 9 And we saw this error message here. I've -- where
12:50:51 10 before I blew up the error message part, I'm showing you
12:50:55 11 the whole screen, and it shows you the amount that the
12:50:58 12 customer entered, and then it says, hey, your amount
12:51:02 13 doesn't match what's on the check.

12:51:03 14 Q. So is Claim 13 calling out that same mobile deposit
12:51:08 15 fraud prevention feature you looked at for the '681 patent?

12:51:10 16 A. It is. And, again, I verified all of this by going
12:51:14 17 through all the source code in DTX-11.

12:51:16 18 Q. And so what do Claims 11 and 22 of the '605 patent
12:51:21 19 require?

12:51:22 20 A. So these, again, have very similar wording. Claim 11
12:51:27 21 is referring to Claim 1, and Claim 22 is referring to
12:51:32 22 Claim 12. And they speak of wherein the confirming occurs
12:51:37 23 after performing a duplicate detection.

12:51:41 24 Q. Is this the same duplicate detection process you talked
12:51:44 25 about for the '681 patent?

12:51:46 1 A. It is, and for the same reasons, including Wells
12:51:49 2 Fargo's corporate representative in his sworn testimony and
12:51:54 3 my review of the source code, that's present in the Wells
12:51:58 4 Fargo Mobile Deposit system.

12:51:58 5 Q. So are Claims 11 and 22 of the '605 patent present in
12:52:02 6 the Wells Fargo system?

12:52:03 7 A. Yes, they are.

12:52:05 8 Q. So could you summarize for the jury what you concluded
12:52:10 9 about the asserted claims of the '605 patent?

12:52:12 10 A. The asserted claims of the '605 patent are present in
12:52:18 11 the Wells Fargo Mobile Deposit system, and to my knowledge,
12:52:20 12 there are no disputed elements.

12:52:23 13 Q. So based on all the technical analysis you've conducted
12:52:26 14 and presented today, what have you concluded about
12:52:29 15 infringement of the '681 and the '605 patents?

12:52:31 16 A. So for all the reasons I've presented, the Wells Fargo
12:52:36 17 Mobile Deposit system infringes the '681 and the '605
12:52:41 18 asserted claims.

12:52:43 19 Q. Now, in the examples you walked through when we were
12:52:47 20 talking about the claimed functionality, the examples were
12:52:51 21 on sort of an iPhone-type device; is that right?

12:52:54 22 A. The example was an iPhone device, yes.

12:52:55 23 Q. Does the infringing Wells Fargo system work with other
12:52:58 24 types of mobile devices?

12:52:59 25 A. It does. It works on an -- on an iPad, as well. For

12:53:08 1 example, it works on a whole range of devices, Android
12:53:11 2 devices, devices with and without keyboards.

12:53:14 3 Q. And so what do you make of that, that the claimed
12:53:17 4 systems work on this wide range of customer devices?

12:53:21 5 A. So this matches the durability that I mentioned in the
12:53:28 6 USAA patented system.

12:53:31 7 Q. Now, earlier today, we talked about some different
12:53:36 8 versions of the software applications and the server
12:53:39 9 software. Do you remember that?

12:53:41 10 A. I do.

12:53:42 11 Q. Are these different -- these are versions of the
12:53:45 12 software that Wells Fargo produced in this case under that
12:53:48 13 protective order that you mentioned; is that right?

12:53:50 14 A. Yes, under the protective order, and I reviewed all the
12:53:54 15 versions. And just to reiterate, I found that all the
12:53:57 16 versions use the same technology. And so based on my
12:54:02 17 analysis, all the versions also read against the USAA
12:54:08 18 patented inventions.

12:54:09 19 Q. So just to be clear, you reviewed every version of the
12:54:14 20 iPhone and Android application, as well as the server code
12:54:17 21 that Wells Fargo made available to you and to USAA in this
12:54:21 22 case; is that right?

12:54:22 23 A. That's correct. There -- there were earlier versions,
12:54:24 24 I imagine, but they made versions available back to May of
12:54:28 25 2014.

12:54:28 1 Q. And so looking at this chart, the earliest version that
12:54:32 2 was made available to you was this 2.0.6 version in May
12:54:36 3 2014?

12:54:36 4 A. Yes, and the server code -- code version of 3.4.2.2.

12:54:41 5 Q. Now, were there versions of that Wells Fargo
12:54:46 6 application that were released after the patents issued in
12:54:52 7 July of 2018?

12:54:53 8 A. Yes. When the patent was issued, version 3.1.3 and 4.5
12:54:59 9 of the server code were in effect, and then Wells Fargo
12:55:02 10 released version 3.7.1 for the iPhone and 3.7 for the
12:55:08 11 Android and then updated Android to 3.7.1. And also the
12:55:13 12 server code was released as version 4.5.1, all after the
12:55:19 13 patents issued.

12:55:20 14 Q. And has Wells Fargo been using the Wells Fargo Mobile
12:55:23 15 Deposit system continuously since July 2018?

12:55:26 16 A. Yes, they have. On average, they've made six million
12:55:31 17 successful deposits per month with this infringing Wells
12:55:37 18 Fargo Mobile Deposit system.

12:55:37 19 Q. And just for the record, does that -- that data come
12:55:43 20 from Plaintiff's Exhibit 1399?

12:55:45 21 A. It does. I didn't come up with that number myself.

12:55:48 22 Q. So each of those six million successful mobile deposits
12:55:52 23 per month with the Wells Fargo system, is it your opinion
12:55:56 24 that every one of those deposits uses all of that claimed
12:55:58 25 functionality that you discussed earlier today?

12:56:00 1 A. Yes, it is.

12:56:03 2 Q. Thank you, Professor Conte.

12:56:06 3 MR. ROWLES: I pass the witness.

12:56:07 4 THE COURT: All right. Cross-examination by the
12:56:08 5 Defendant.

12:56:12 6 MR. MELSHEIMER: May it please the Court.

12:56:15 7 THE COURT: Proceed when you're ready,
12:56:17 8 Mr. Melsheimer.

12:56:18 9 MR. MELSHEIMER: Thank you, Your Honor.

12:56:18 10 CROSS-EXAMINATION

12:56:19 11 BY MR. MELSHEIMER:

12:56:19 12 Q. Dr. Conte, good afternoon.

12:56:21 13 A. Good afternoon.

12:56:22 14 Q. Let's see if we can agree on a few things, if that's --
12:56:26 15 if that's all right with you?

12:56:27 16 A. Yes.

12:56:28 17 Q. I want to talk to you about some things that the 13
12:56:34 18 claims in these patents do not claim to have invented. Are
12:56:37 19 you with me?

12:56:37 20 A. Okay.

12:56:41 21 Q. All right. So the patents in this case did not invent
12:56:44 22 the concept of checking accounts generally, right?

12:56:48 23 A. That's correct.

12:56:48 24 Q. Checking accounts have been around almost as long as
12:56:52 25 we've had banks; isn't that right, sir?

12:56:53 1 A. I -- I wouldn't know. I would assume so.

12:56:57 2 Q. When did you get your first checking account?

12:56:58 3 A. When I was 16.

12:57:00 4 Q. Okay. So that was about 10 years ago?

12:57:03 5 A. Maybe a little more.

12:57:05 6 Q. A little bit longer than that. Maybe about 30 -- 40,

12:57:08 7 50 years ago?

12:57:09 8 A. I wouldn't want to speculate.

12:57:10 9 Q. You're under oath, sir.

12:57:13 10 So I want to focus on -- on checking.

12:57:17 11 The patents in this case did not claim to invent
12 those odd-looking numbers at the bottom of the check that
13 you've described as the MICR line, right?

12:57:27 14 A. That's correct.

12:57:28 15 Q. What does MICR stand for, remind me?

12:57:31 16 A. Magnetic ink character recognition.

12:57:32 17 Q. And that is something -- USAA didn't invent that,
18 right?

12:57:38 19 A. No.

12:57:40 20 Q. And that was invented, as I understand it, many decades
21 ago in the late 1960s. Does that sound right to you?

12:57:48 22 A. I don't know the exact date. But I'll accept that.
23 That sounds reasonable.

12:57:51 24 Q. So once a check is deposited, Doctor, there's a lot of
25 item processing that goes along with that check. Are you

12:58:00 1 familiar with that concept?

12:58:01 2 A. Yes.

12:58:02 3 Q. Did you hear Mr. Oakes, one of the inventors who was
12:58:07 4 brought by video deposition, talk about this concept of
12:58:11 5 item processing?

12:58:12 6 A. Yes, I did.

12:58:14 7 Q. USAA didn't invent the concept of item or check
12:58:19 8 processing, right?

12:58:21 9 A. I don't think that's entirely accurate.

12:58:23 10 Q. Well, did you hear him say that there was this whole
12:58:26 11 back end of item processing once the check got into the
12:58:32 12 bank, that they didn't have to do over or start from
12:58:35 13 scratch with? Do you remember that?

12:58:37 14 A. I believe so. I -- I'd need to look at the transcript.
12:58:42 15 I'm sorry.

12:58:42 16 Q. Well, let's -- let's talk about some of the things
12:58:44 17 involved in that item processing. Are you with me?

12:58:47 18 A. Yes.

12:58:47 19 Q. So you -- you mentioned having worked at one point for
12:58:53 20 IBM or worked -- consulted with IBM?

12:58:55 21 A. Yes.

12:58:55 22 Q. So you know that IBM makes these big check sorting
12:59:01 23 machines called reader/sorters, right?

12:59:04 24 A. I wasn't in that division.

12:59:06 25 Q. I'm sorry. I didn't mean to ask you if you were -- if

12:59:09 1 you were in that division, sir. I'm asking you, did you
12:59:12 2 know that IBM made these big reader/sorter machines?
12:59:17 3 A. Yes, I did.
12:59:18 4 Q. Right. Those are these machines that take up seemingly
12:59:22 5 almost a whole room with lots of different pockets that
12:59:27 6 read and sort checks. Do I have that right?
12:59:31 7 A. I believe so. Again, I haven't reviewed the
12:59:34 8 functionality of those.
12:59:36 9 Q. Have you heard of the IBM 3890 reader/sorter machine
12:59:41 10 that's involved in check processing?
12:59:43 11 A. Yes, I've heard of that.
12:59:45 12 Q. It can operate to process hundreds of thousands of
12:59:48 13 checks in a single day. Did you know that?
12:59:50 14 A. Yes, I believe I -- I heard that at one point.
12:59:52 15 Q. USAA didn't invent those machines, right, sir?
12:59:55 16 A. That's correct, they did not.
12:59:57 17 Q. USAA didn't invent any physical improvements to those
01:00:01 18 machines, correct?
01:00:03 19 A. My understanding is, no, they did not.
01:00:06 20 Q. Those machines -- those big reader/sorter machines --
01:00:12 21 is that what they're called, sir, reader/sorters?
01:00:15 22 A. I believe so.
01:00:16 23 Q. So those reader/sorter machines were eventually
01:00:20 24 equipped with cameras that took pictures of the checks as
01:00:23 25 they were running through the machine at high speeds,

01:00:26 1 right?

01:00:26 2 A. Yes, that's my understanding.

01:00:28 3 Q. And USAA -- do you know when that happened, when those
01:00:35 4 cameras were put on those big IBM reader/sorter machines?

01:00:39 5 A. I don't, sitting here today, recall the exact date.

01:00:42 6 Q. Well, do you know that USAA didn't invent those cameras
01:00:45 7 that went on those machines?

01:00:47 8 A. That's correct.

01:00:51 9 Q. And they didn't invent any -- USAA didn't invent any
01:00:56 10 physical improvements to the cameras -- strike that.

01:01:01 11 To your knowledge, USAA hasn't invented any -- in
01:01:07 12 the claims in these patents, any physical improvements to
01:01:09 13 the actual camera device. Do I have that right?

01:01:12 14 A. That's my understanding, yes.

01:01:13 15 Q. Cameras on mobile devices, for example, have gotten a
01:01:24 16 lot better over the years, true?

01:01:25 17 A. I wouldn't characterize them as better, but they've
01:01:28 18 gotten denser. They can take more -- more dense pictures.

01:01:31 19 Q. Okay. When I say better, I mean they can get better
01:01:35 20 pictures. Or can we -- can we agree that that's a good
01:01:39 21 definition of "better" for a layman?

01:01:40 22 A. Yes, that's fine.

01:01:41 23 Q. All right. Thank you.

01:01:42 24 So what I'm -- and what -- and I guess the point
01:01:45 25 you're making is, this -- this notion of pixels, if you get

01:01:49 1 more pixels in a picture, more information, more data, you

01:01:52 2 can get a clearer picture. Do I have that about right?

01:01:57 3 A. Not exactly.

01:01:58 4 Q. Well, let's see if we can agree on this.

01:02:02 5 A. Okay.

01:02:03 6 Q. The camera on the first iPhone back in 2007 is not

01:02:09 7 nearly as good as the camera on the iPhone 11 that came out

01:02:13 8 last year. Can we agree on that?

01:02:14 9 A. Yes.

01:02:15 10 Q. And over time, there have been various improvements to

01:02:20 11 the cameras on iPhones and Android phones that have made

01:02:26 12 certain other capabilities possible, right?

01:02:31 13 A. What do you mean by other capabilities?

01:02:33 14 Q. Well, like taking good pictures of a check, right?

01:02:37 15 A. I would assume so.

01:02:44 16 Q. Well -- and, again, you certainly know that USAA wasn't

01:02:47 17 in the camera business in developing physical improvements

01:02:49 18 to any of those cameras that go in any kind of mobile

01:02:53 19 phone, right?

01:02:53 20 A. Yes, I believe that's correct.

01:02:58 21 Q. Now, you've heard of this notion of scanners --

01:03:05 22 scanners different from a camera, right?

01:03:07 23 A. A scanner is a kind of camera.

01:03:11 24 Q. Okay. Well, a scanner is a -- is a kind of camera.

01:03:14 25 But is it different from the kind of cameras that are in

01:03:16 1 our mobile phones today?

01:03:18 2 A. Well, in what aspect?

01:03:22 3 Q. Well, let me ask it a different way.

01:03:25 4 You've heard about these -- I think you held up or
01:03:28 5 you have a picture in one of your slides of a scanner, a
01:03:31 6 Panini scanner?

01:03:32 7 A. That's correct.

01:03:33 8 Q. Okay. So that is a device that can be used to scan
01:03:39 9 documents like checks or other kinds of documents, right?

01:03:43 10 A. I believe it's specific to checks, but, yes.

01:03:45 11 Q. And the scanning technology is -- is different from the
01:03:50 12 technology in our mobile phones or -- or is it the same,
01:03:54 13 sir?

01:03:54 14 A. Well, it has magnetic ink reading, so it is different.

01:03:59 15 Q. Okay. Magnetic ink reading, just like that MICR line
01:04:02 16 you were telling us about earlier?

01:04:04 17 A. Yes.

01:04:04 18 Q. Okay. So USAA didn't invent the scanners that you
01:04:12 19 described in some of your slides either, right?

01:04:14 20 A. They did not.

01:04:18 21 Q. Now, we've heard a lot in the trial so far about mobile
01:04:29 22 banking, right? You've been here the whole time?

01:04:31 23 A. I have.

01:04:32 24 Q. USAA did not invent a mobile phone, right?

01:04:34 25 A. That's correct.

01:04:36 1 Q. A smartphone?

01:04:36 2 A. That's correct.

01:04:38 3 Q. Or any other kind of mobile device, right?

01:04:41 4 A. That's correct.

01:04:44 5 Q. It didn't invent the operating system for a smartphone,
01:04:48 6 right?

01:04:48 7 A. That's correct.

01:04:55 8 Q. Sometimes that's referred to as the iOS for the iPhone.
01:05:00 9 That's something that Apple created, right?

01:05:02 10 A. There's also -- yes, there's also Android and Simeon
01:05:07 11 that you heard about.

01:05:08 12 Q. You're reading my notes here. Also, Android is another
01:05:12 13 operating system, right, sir?

01:05:13 14 A. It is.

01:05:13 15 Q. And USAA didn't write that one either, right?

01:05:15 16 A. I'm not aware that they were involved in it. I think
01:05:18 17 they did have influence into iOS at one point.

01:05:22 18 Q. But they didn't create the Apple iOS operating system,
01:05:26 19 right, sir?

01:05:26 20 A. No.

01:05:27 21 Q. And they didn't create -- I'm sorry, were you finished?

01:05:30 22 A. It was created by Apple.

01:05:31 23 Q. And they didn't create the Android operating system
01:05:34 24 either, right?

01:05:34 25 A. That's correct.

01:05:35 1 Q. Those operating systems are what makes -- or what
01:05:42 2 drives or runs an Android phone or an Apple phone, true?
01:05:46 3 A. To some degree, yes.
01:05:48 4 Q. USAA didn't create any improvement to the processor,
01:06:01 5 the brains of the computer in the phone, right?
01:06:05 6 A. I don't -- I don't know one way or the other on that.
01:06:08 7 Q. Well, those processors -- do you know this, sir? Those
01:06:14 8 processors are made by companies like Intel and Qualcomm
01:06:17 9 and Texas Instruments. Do I have that right?
01:06:20 10 A. Among others, yes.
01:06:25 11 Q. Okay. And those are the -- the brains, if you will,
01:06:27 12 the microprocessors they're sometimes called, right?
01:06:31 13 A. That's not precise.
01:06:33 14 Q. Okay. Processor, is that -- is that precise?
01:06:36 15 A. That's actually a little imprecise, as well.
01:06:39 16 Q. What do you want to call it?
01:06:40 17 A. They're called either application processors or media
01:06:44 18 processors.
01:06:45 19 Q. Okay. I'm going to call them application processors.
01:06:47 20 Will that work?
01:06:48 21 A. Yes.
01:06:49 22 Q. So application processors are made by companies, among
01:06:53 23 others, Intel, Qualcomm, and Texas Instruments, right?
01:06:59 24 A. Yes.
01:06:59 25 Q. They go into the mobile phones, those kinds of

01:07:05 1 processors, to make the phones smart?

01:07:11 2 A. That isn't the only reason they're smart.

01:07:14 3 Q. But isn't that one of the reasons why they're smart,
01:07:18 4 sir?

01:07:18 5 A. Sure. Smart is not a technical term.

01:07:20 6 Q. Now, you talked about OCR in your direct examination.
01:07:28 7 Do you remember that?

01:07:29 8 A. Yes.

01:07:29 9 Q. Now, that's a technology that enables a computer to
01:07:34 10 read text off a document. Do I have that right?

01:07:38 11 A. Among other things.

01:07:39 12 Q. USAA didn't invent OCR, right?

01:07:45 13 A. I'm not aware of whether they did or not invent some
01:07:48 14 aspect of the OCR they use.

01:07:50 15 Q. In your work with USAA in this case, has anyone ever
01:07:53 16 told you from USAA's side, Dr. Conte, we invented OCR?

01:07:59 17 A. Not exactly.

01:08:02 18 Q. OCR is a technology that's been around for decades,
01:08:06 19 isn't it, sir?

01:08:07 20 A. That's inaccurate.

01:08:08 21 Q. Okay. Was it well-known in banking, to your knowledge,
01:08:13 22 in the early 2000s?

01:08:16 23 A. I would say some aspect of OCR was known.

01:08:19 24 Q. I want to talk about -- a little bit more about the
01:08:32 25 user-facing process of mobile deposit. Are you -- are you

01:08:37 1 with me?

01:08:37 2 A. I'm not sure what you mean by that.

01:08:39 3 Q. Well, the part that shows up on your phone.

01:08:41 4 A. Could you be just a little more specific?

01:08:47 5 Q. Well, we're going to get to this in a minute, sir, but

01:08:51 6 there's -- your report talks about a bunch of computers

01:08:54 7 that are called servers that are remote from the user's

01:09:02 8 cell phone, right?

01:09:03 9 A. Yes.

01:09:04 10 Q. Okay. So I want to focus on what the -- the user

01:09:10 11 doesn't see, for example, all the stuff that's going on in

01:09:13 12 the background at those bank servers, true?

01:09:17 13 A. Mostly correct, yes.

01:09:18 14 Q. Okay. So I want to focus on just what the user sees

01:09:21 15 for my next couple of questions, sir. Are you with me?

01:09:26 16 A. Yes.

01:09:26 17 Q. So there are features that are common to -- to banking

01:09:30 18 that these patents also did not invent. For example,

01:09:35 19 opening up a new account online. These patents don't claim

01:09:40 20 to have invented that, right?

01:09:41 21 A. They do not.

01:09:42 22 Q. Or transferring funds between accounts. These patents

01:09:47 23 don't claim to have invented that either, right?

01:09:49 24 A. It's not part of mobile deposit.

01:09:50 25 Q. Or reporting a lost or stolen debit card. These

01:09:56 1 patents don't claim to have invented that either, right?

01:09:58 2 A. Can I amend my prior answer?

01:10:01 3 Actually, you could use a check deposit to move
01:10:04 4 funds from one account to another.

01:10:06 5 Q. But the concept of transferring funds from your savings
01:10:12 6 account to your checking account, that's not something
01:10:14 7 that's invented by these patents, true?

01:10:16 8 A. The abstract concept is not.

01:10:18 9 Q. Or setting up paperless billing?

01:10:22 10 A. No, it's not.

01:10:23 11 Q. Or setting up alerts when one of your children
01:10:30 12 withdraws something from their account and it's over a
01:10:33 13 certain amount so you want to get notified about that.

01:10:36 14 These patents didn't invent that either, right?

01:10:43 15 A. The withdrawing of large amounts, I don't believe so.

01:10:47 16 Q. The alert?

01:10:48 17 A. The alert of withdrawing a large amount, I do not
01:10:51 18 believe so.

01:10:51 19 Q. So we've talked about -- a little bit about what
01:10:59 20 happens on the mobile device. And, again, I want to talk
01:11:03 21 to you in a minute about what happens in these servers.

01:11:06 22 But are you familiar with the term "back end"?

01:11:09 23 A. Yes, generally.

01:11:10 24 Q. Okay. And the back end is all those -- we've talked
01:11:16 25 about this a little bit. The back end is all those

01:11:19 1 internal systems at the bank in computers and other
01:11:25 2 equipment that process the check after it's been received
01:11:28 3 for deposit, right?
01:11:30 4 A. Yes, that's my understanding.
01:11:33 5 Q. Is it your understanding, sir, that the processing of a
01:11:37 6 check for deposit takes place in that back end system
01:11:42 7 whether the check is deposited on a mobile deposit, whether
01:11:47 8 it's deposited at an ATM, or whether you walk into the bank
01:11:52 9 and hand it to the teller?
01:11:55 10 A. Depends on the piece of the back end we're talking
01:11:57 11 about.
01:11:58 12 Q. Can you agree with me that there's some back end
01:12:02 13 processing that has to occur whether you deposit the check
01:12:07 14 from your mobile phone, from an ATM, or from a bank teller?
01:12:11 15 A. Yes, sure.
01:12:12 16 Q. These patents do not claim to have invented the
01:12:21 17 computers, the machines, the other devices necessary for
01:12:26 18 that so-called back end processing, fair?
01:12:30 19 A. Not the hardware, no.
01:12:33 20 Q. All right, sir. I want to talk just a little bit about
01:12:44 21 the patent process. Are you with me?
01:12:46 22 A. Yes.
01:12:46 23 Q. So you have a general understanding of how patents
01:12:51 24 work, right?
01:12:51 25 A. Yes.

01:12:54 1 Q. You've seen that video that His Honor played for the
01:12:58 2 jurors?

01:12:58 3 A. No, I've never seen that video.

01:13:00 4 Q. Never actually watched it yourself, okay.

01:13:02 5 Well, can we agree that the claims of the patent
01:13:06 6 are what give the public notice of the boundaries of the
01:13:09 7 invention, right?

01:13:10 8 A. Yes, that's correct.

01:13:11 9 Q. But you understand there's a dispute here between the
01:13:19 10 specifications of the '605 and the '681 patent and whether
01:13:23 11 those specifications adequately support or describe the
01:13:28 12 claims; do you understand that's the dispute?

01:13:31 13 A. I understand that's the dispute, yes.

01:13:33 14 Q. That's one of the disputes in the case, right?

01:13:35 15 A. Yes.

01:13:36 16 Q. Now, you have your own patents, right?

01:13:46 17 A. I have 40, yes.

01:13:47 18 Q. And when you wrote those patents, you understood that
01:13:52 19 it was important that you included this detailed
01:13:58 20 description of what you had invented so it would support
01:14:03 21 the invention you were claiming in the claims, true?

01:14:07 22 A. Yes.

01:14:10 23 Q. Now, some of your patents -- I looked at a couple of
01:14:15 24 them -- are what are known as continuations of earlier
01:14:19 25 patents, right?

01:14:20 1 A. Yes, I have some continuations.

01:14:22 2 Q. And you understand --

01:14:23 3 THE COURT: Counsel, approach the bench, please.

01:14:33 4 (Bench conference.)

01:14:34 5 THE COURT: There's a limine order in this case
01:14:36 6 precluding the mention of unasserted patents. We're going
01:14:40 7 right down a path of this witness's personal patents and
01:14:44 8 what they mean and what they do?

01:14:45 9 MR. MELSHEIMER: No, sir, just the notion that you
01:14:47 10 can get a continuation and relate back to an earlier
01:14:51 11 application. That's all I was trying to do. I can do it
01:14:53 12 in a different way if the Court --

01:14:55 13 THE COURT: Do it without reference to his
01:14:56 14 personal patents.

01:14:57 15 MR. MELSHEIMER: I'll do that, Your Honor.

01:14:59 16 (Bench conference concluded.)

01:15:03 17 THE COURT: Let's proceed.

01:15:06 18 Q. (By Mr. Melsheimer) Dr. Conte, without regard to your
01:15:09 19 personal patents, you understand that it's possible to take
01:15:17 20 advantage of an earlier-filed date of a patent application,
01:15:27 21 just like what's happened in this case, right?

01:15:28 22 A. I wouldn't quite describe it that way.

01:15:31 23 Q. Well, and I'm not trying to use any -- any words to --
01:15:35 24 to confuse you at all, sir.

01:15:37 25 But you understand that the patents in this case,

01:15:42 1 for example, were filed in 2017, right?

01:15:45 2 A. The continuations were, yes.

01:15:47 3 Q. The continuations were. And they were -- they purport
01:15:53 4 or claim to be continued from an original application that
01:15:58 5 was filed on Halloween in 2006. Do you understand that,
01:16:02 6 sir?

01:16:02 7 A. I never thought of it as Halloween, but...

01:16:08 8 And I don't think that's significant, but yes.

01:16:10 9 Q. October 31st.

01:16:12 10 A. Yes, I know when Halloween is. Thank you.

01:16:15 11 Q. All right. So you understand that in order to get that
01:16:18 12 earlier date, that 2006 date, that the specification has to
01:16:33 13 describe the full scope of the claims claimed in 2017,
01:16:39 14 right?

01:16:39 15 A. Yes.

01:16:39 16 Q. You've heard that term full scope before --

01:16:43 17 A. Yes.

01:16:44 18 Q. -- in this context?

01:16:48 19 A. I believe so.

01:16:49 20 Q. And you understand specification, that the root of that
01:16:55 21 word is specific, right?

01:16:59 22 A. Yeah, I suppose so. I need to think back to my Latin.

01:17:05 23 Q. You went through a portion of the specification on your
01:17:08 24 direct examination, right?

01:17:09 25 A. I did.

01:17:14 1 Q. And you did a report in this case that was in excess of
01:17:17 2 500 pages; do you remember that?

01:17:19 3 A. It was long, yes.

01:17:20 4 Q. You did not offer an opinion in your report about
01:17:23 5 whether the specification sufficiently describes the
01:17:27 6 claimed inventions, true?

01:17:28 7 A. I don't -- I don't think that's exactly accurate, I'm
01:17:37 8 sorry.

01:17:37 9 Q. You did not offer an opinion on the validity of these
01:17:40 10 patents, true?

01:17:42 11 A. That's true.

01:17:42 12 Q. Someone named Mr. Calman did that, right?

01:17:47 13 A. Yes.

01:17:48 14 Q. He was a consultant hired by the Plaintiffs in this
01:17:51 15 case?

01:17:51 16 A. Much like me, yes.

01:17:54 17 Q. Is he in court today, sir?

01:17:56 18 A. I don't see him.

01:17:59 19 Q. Has he been in court since the trial started to your
01:18:02 20 recollection?

01:18:02 21 A. I don't believe so.

01:18:03 22 Q. You know, he's permitted to be in court as an expert
01:18:08 23 witness and hear the testimony if he so desires, just like
01:18:13 24 you're here, correct?

01:18:14 25 A. I'd assume so, yes.

01:18:16 1 Q. You've been here the whole time, haven't you?

01:18:18 2 A. Yes, I have.

01:18:18 3 Q. And you plan to stay until the trial is over, correct?

01:18:22 4 A. I suppose so.

01:18:24 5 Q. Don't look so excited about it, sir.

01:18:28 6 A. I'm sorry.

01:18:30 7 THE COURT: Let's move along.

01:18:32 8 Q. (By Mr. Melsheimer) Now, do you understand, sir, that
01:18:38 9 in making the determination of whether a specification
01:18:45 10 filed in 2006 describes claims made 11 years later, that
01:18:52 11 it's not simply a matter of pointing to words?

01:19:03 12 A. Oh, I think that's part of it.

01:19:04 13 Q. Well, but it's not simply pointing to words, sir,
01:19:08 14 right?

01:19:08 15 A. That's -- sure, you can do other things, as well,
01:19:13 16 absolutely.

01:19:13 17 Q. Well, for example, the term "college dormitories" is
01:19:19 18 used at Column 3, Line 58 of the '681 patent. Do you have
01:19:22 19 your patent there, sir?

01:19:23 20 A. I recall them referring to those, yes.

01:19:25 21 Q. Just because the words "college dormitories" are in the
01:19:30 22 patent doesn't mean this is a patent on college
01:19:34 23 dormitories, right?

01:19:35 24 A. It depends on what aspect of college dormitories are
01:19:40 25 claimed.

01:19:40 1 Q. So it's not just a mention of the words, right?

01:19:42 2 A. It's the mention of the concepts.

01:19:43 3 Q. And the context in which they're mentioned, right?

01:19:48 4 A. Well, all concepts are in a context.

01:19:54 5 Q. Look at column -- do you have the patent in front of
01:19:57 6 you, sir?

01:19:58 7 A. Which patent are we speaking?

01:20:00 8 Q. '681.

01:20:01 9 MR. MELSHEIMER: Mr. Bakale, can we pull up the
01:20:04 10 '681, Column 12, Line 18?

01:20:21 11 Q. (By Mr. Melsheimer) And you see on Line 18 the word
01:20:24 12 "streaming"?

01:20:24 13 THE COURT: Let him get to the patent. You asked
01:20:26 14 him to turn to it.

01:20:28 15 MR. MELSHEIMER: I apologize, Your Honor.

01:20:29 16 Q. (By Mr. Melsheimer) Mr. -- Dr. Conte, it's also on the
01:20:32 17 screen if that would be easier for you.

01:20:34 18 A. Yeah, I was looking at the context, but, yes, I see it.

01:20:38 19 Q. So we see the word "streaming," right?

01:20:40 20 A. Yes.

01:20:41 21 Q. Now, that doesn't mean -- just because "streaming" is
01:20:44 22 in there, doesn't mean that these patents can claim
01:20:48 23 Netflix, right?

01:20:48 24 A. It's being used in a different way.

01:20:50 25 Q. Different context, right?

01:20:51 1 A. Yes.

01:20:56 2 Q. And you know that because you're reading both around
01:20:58 3 those words but also what came before and what came after,
01:21:02 4 right?

01:21:02 5 A. Yes.

01:21:08 6 Q. Now, you -- you brought forth a couple of examples from
01:21:18 7 the specification, and I want to take a couple of ones with
01:21:22 8 you. You didn't use "streaming" or "college dormitories,"
01:21:25 9 but let me pull out --

01:21:29 10 MR. MELSHEIMER: If you would, sir, Mr. Bakale, do
01:21:30 11 we have Slide -- well, let's just go to the '605 -- '605
01:21:39 12 patent at Line -- Column 7, starting at Line 23.

01:21:43 13 Q. (By Mr. Melsheimer) Dr. Conte, the '605 patent --

01:21:48 14 A. Yes, I'm there.

01:21:49 15 Q. -- Column 7, Line 23. Do you remember highlighting
01:21:58 16 this one in your -- in your direct examination, sir?

01:22:01 17 A. I do.

01:22:01 18 Q. And here it's talking about --

01:22:03 19 MR. MELSHEIMER: -- starting with Line 23,
01:22:08 20 Mr. Bakale --

01:22:10 21 Q. (By Mr. Melsheimer) -- account owner?

01:22:11 22 A. Yes.

01:22:11 23 Q. It says: Account owner may communicate with financial
01:22:18 24 institution by way of communication network which may
01:22:21 25 include -- and then there's a whole list of things that

01:22:23 1 follow, right?

01:22:24 2 A. Yes.

01:22:24 3 Q. Intranet, Internet, local area network, wide area

01:22:31 4 network, public switched telephone network, cellular

01:22:36 5 network. It's basically a list of every common kind of

01:22:44 6 network that was around back in 2006, right?

01:22:47 7 A. I wouldn't characterize it that way.

01:22:52 8 Q. Well, it's -- can you characterize it, sir, as a list

01:22:55 9 of some common networks that were known in 2006?

01:22:59 10 A. I wouldn't quite characterize it that way either.

01:23:03 11 Q. Would you characterize it as different communication

01:23:08 12 protocols that were around in 2006?

01:23:10 13 A. This isn't specific to protocols, so I wouldn't

01:23:14 14 characterize it that way either.

01:23:15 15 Q. Well, how would you characterize it, sir?

01:23:20 16 A. Well, these are different communication channels

01:23:23 17 available to a consumer.

01:23:24 18 Q. Communication channels. Can we agree on that?

01:23:27 19 A. Available to a consumer, yes.

01:23:29 20 Q. Okay. So this is a list of communication channels

01:23:33 21 available to a consumer back in -- back in 2006, which

01:23:39 22 include picking up the telephone and calling your bank,

01:23:48 23 right?

01:23:48 24 A. Well, I'd need to look at the context. Of course, you

01:23:50 25 can use telephone line with a modem to transmit data.

01:23:53 1 Q. Well, and I'm just -- I'm just reading it, and you tell
01:23:57 2 me if I'm reading it right. Account owner may communicate
01:24:00 3 with financial institutions by way of a communication
01:24:02 4 network.

01:24:04 5 And then if you go down a little bit long --
01:24:07 6 farther along to Line 28: Account owner may communicate
01:24:11 7 with financial institution by phone, email, instant
01:24:14 8 messaging, facsimile, and the like.

01:24:18 9 Right?

01:24:19 10 A. Yes.

01:24:19 11 Q. So that's just talking about ways the account owner can
01:24:22 12 communicate, including by picking up the phone to their
01:24:25 13 bank, right?

01:24:26 14 A. Well, again, picking up the phone doesn't imply --
01:24:32 15 doesn't necessarily imply talking on the phone.

01:24:35 16 Q. But it includes that?

01:24:35 17 A. Yes, it does.

01:24:37 18 Q. Email, right?

01:24:37 19 A. Sure.

01:24:38 20 Q. Texting, that's what instant messaging is, isn't --
01:24:46 21 isn't it?

01:24:46 22 A. Back then, it was a form of texting. It's not quite
01:24:50 23 the same.

01:24:50 24 Q. And isn't it correct, sir, that this is the only point
01:24:54 25 in the spec of the '605 patent where there's any specific

01:24:59 1 mention of a cellular network?

01:25:03 2 A. I haven't done a search.

01:25:05 3 Q. Well, can you point us to -- based just on your

01:25:10 4 recollection, and you spent about -- did you say 300 hours

01:25:14 5 working on this?

01:25:14 6 A. Yes, a long time reading source code.

01:25:16 7 Q. Okay. So in those 300 hours, do you recall another

01:25:22 8 mention of cellular or cell phone or cell in the '605

01:25:29 9 patent?

01:25:29 10 A. I don't recall one way or another. I'd need to check

01:25:32 11 through this.

01:25:32 12 Q. Now, let's take a look at another portion that you

01:25:47 13 showed the jury on your direct examination, sir. And that

01:25:52 14 is in the -- this one is the '681 patent.

01:26:06 15 MR. MELSHEIMER: Might I have one moment, Your

01:26:08 16 Honor? I'm having a little trouble reading this one.

01:26:10 17 THE COURT: You may have a moment, counsel.

01:26:31 18 MR. MELSHEIMER: May it please the Court.

01:26:32 19 Mr. Bakale, can you call up Column 3, Line 37?

01:27:05 20 Q. (By Mr. Melsheimer) Actually, Dr. Conte, I'm sorry, I

01:27:06 21 want to pull up -- it's from your deck at 2.25.

01:27:17 22 MR. MELSHEIMER: I apologize for the delay, Your

01:27:19 23 Honor.

01:27:19 24 Q. (By Mr. Melsheimer) This was one of the slides you

01:27:20 25 used on your direct examination, sir?

01:27:22 1 A. Yes, it is.

01:27:23 2 Q. Okay. And you say referring back to Figure 1 -- or,
01:27:31 3 excuse me, the slide says: An image device is
01:27:34 4 communicatively coupled to the computer.

01:27:37 5 Do you see that?

01:27:37 6 A. Yes, I do.

01:27:38 7 Q. Now, that is referencing a figure of the patent, right?

01:27:40 8 A. Yes, it is.

01:27:45 9 Q. You didn't show the jury this figure in your slides,
01:27:47 10 however, did you, sir?

01:27:47 11 A. I did not.

01:27:48 12 MR. MELSHEIMER: Let's pull up Figure 1 of the
01:27:51 13 '605 patent. And the jurors have this in their notebook,
01:27:59 14 along with the -- both patents.

01:28:03 15 Q. (By Mr. Melsheimer) But this is Figure 1 of the '605
01:28:04 16 patent.

01:28:06 17 Now, Figure 1 shows a -- the account owner or
01:28:12 18 person right on the left?

01:28:15 19 A. Yes.

01:28:16 20 Q. And they're at a desk with what looks like a computer,
01:28:21 21 right?

01:28:21 22 A. That's what the illustration shows here.

01:28:23 23 Q. And the illustration looks like that the image capture
01:28:28 24 device is sitting out to the right of the desktop computer.

01:28:32 25 Do you see that?

01:28:33 1 A. Yes.

01:28:33 2 Q. They're shown as separate devices in this figure?

01:28:37 3 A. In this figure, they are, yes.

01:28:41 4 Q. Now, there are some differences, are there not, sir,
01:28:52 5 between the '605 specification and the '681 specification?

01:28:57 6 A. Yes, they have different parents.

01:29:00 7 Q. And -- and there's differences in some of the wording
01:29:05 8 between the '605 and the '681; is that correct?

01:29:09 9 A. Yes, the specifications are different.

01:29:10 10 Q. So one difference is, is the '605 specification in
01:29:17 11 Column 8, which we'll pull up.

01:29:32 12 MR. MELSHEIMER: Starting with Figure 4,
01:29:33 13 Mr. Bakale, there -- the text on Figure 4 which I think is
01:29:38 14 Line 3.

01:29:39 15 Q. (By Mr. Melsheimer) So in Column 8 -- and the columns
01:29:43 16 are on the top of the page of the patent, Dr. Conte; is
01:29:46 17 that right?

01:29:46 18 A. Yes, that's right.

01:29:47 19 Q. And then the lines -- not -- not all the lines are --
01:29:52 20 are called out. You have to kind of add up between the
01:29:55 21 numbers, right?

01:29:56 22 A. And sometimes they don't line up, annoyingly, so, yes.

01:30:03 23 Q. So looking at Column 8, starting with Figure -- the
01:30:08 24 line that begins Figure 4 on Line 3, it talks about
01:30:11 25 providing a schematic diagram.

01:30:14 1 And then if you go all the way down -- well, about
01:30:16 2 halfway down to Line 11, you see this reference to this
01:30:21 3 term PDAs, right?

01:30:24 4 A. Yes.

01:30:24 5 Q. Now, is it your recollection, sir, that the '681
01:30:34 6 specification -- we're in the '605 -- but that the '681
01:30:39 7 patent specification never once even uses the term "PDAs,"
01:30:47 8 correct?

01:30:47 9 A. Give me a moment.

01:30:49 10 I don't think it uses the specific term, no.

01:30:55 11 Q. And if we can go back to the '605 where we're at now,
01:31:01 12 sir, there's only two mentions of PDAs there, and the other
01:31:08 13 one is a little bit farther down.

01:31:16 14 MR. MELSHEIMER: Thank you, Mr. Bakale.

01:31:19 15 Q. (By Mr. Melsheimer) It is line -- starting on Line 33
01:31:27 16 in Column 8. Are you with me, sir?

01:31:30 17 A. Yes.

01:31:31 18 Q. And there it mentions PDAs for -- for the second time.
01:31:36 19 And it talks about them in a list of other devices which
01:31:42 20 include televisions?

01:31:43 21 A. Yes.

01:31:44 22 Q. And MP3 players?

01:31:50 23 A. Yes.

01:31:50 24 Q. MP3 players are generally used to listen to music,
01:31:55 25 right, sir?

01:31:55 1 A. An iPod would be an example, yes.

01:32:00 2 Q. Kind of one of the original MP3 players, huh?

01:32:05 3 A. One of them, yes.

01:32:06 4 Q. And then television, of course, is what we use to
01:32:08 5 stream Netflix?

01:32:10 6 A. Smart TVs have many applications.

01:32:13 7 Q. Right. But you couldn't put together the streaming

01:32:19 8 that we saw in that earlier section and the word

01:32:23 9 "television" here and come in and say that this patent was

01:32:27 10 a patent of Netflix, right?

01:32:32 11 A. It's not in the claims. There's no claim --

01:32:33 12 Q. It wouldn't be appropriate?

01:32:34 13 A. -- there's no claim with respect to Netflix here.

01:32:40 14 Q. Now, you showed the jury a slide of something called
01:32:56 15 the Palm Treo. Do you remember that?

01:33:02 16 A. Palm Treo 700w, yes.

01:33:05 17 Q. Now, is it fair, sir, you never mentioned the Palm Treo
01:33:10 18 in your 500-plus-page report, did you, sir?

01:33:12 19 A. I believe that's not accurate.

01:33:14 20 Q. Well, see if I can say it this way. You worked closely
01:33:22 21 with another consultant in this case named Mr. Calman,
01:33:27 22 right?

01:33:27 23 A. Yes.

01:33:28 24 Q. And he's the person I asked you about earlier who's not
01:33:31 25 in -- who's not in court and hasn't been in court during

01:33:35 1 this trial, true?

01:33:35 2 A. Yes.

01:33:36 3 Q. Mr. Calman has worked in banking for decades, right?

01:33:41 4 A. That's my understanding, yes.

01:33:42 5 Q. You have not worked in banking for decades, right?

01:33:45 6 A. Not for decades, no.

01:33:47 7 Q. You relied on Mr. Calman for a lot of information about
01:33:52 8 banking operations and -- and similar subject matter, true?

01:33:56 9 A. Yes, among other sources.

01:33:58 10 Q. And it's Mr. Calman that mentioned the Treo in his
01:34:07 11 report, and you didn't call that out specifically, but you
01:34:10 12 did incorporate by reference pages of his report, correct?

01:34:15 13 A. Well, as I've said under oath, we wrote certain
01:34:18 14 sections together. Some ended up in my report, and some in
01:34:22 15 his. And that was one of the sections we wrote together.

01:34:26 16 Q. And do you recall that what Mr. Calman said or the
01:34:36 17 context in which he mentioned the Treo is that he said that
01:34:41 18 by 2006, Windows operating system included Windows mobile
01:34:48 19 phone for use with mobile portable devices. Does that ring
01:34:54 20 a bell?

01:34:54 21 A. Yes, I believe that's -- that's what we wrote.

01:35:11 22 Q. I want to talk to you briefly about a couple of things
01:35:13 23 from the opening statement that you were here for.

01:35:20 24 MR. MELSHEIMER: Do we have Plaintiff's Exhibit

01:35:23 25 18 -- 1.8 -- PDX-1.8?

01:35:28 1 Q. (By Mr. Melsheimer) Do you remember this was a slide

01:35:29 2 that was shown to the jury by USAA in opening statement?

01:35:32 3 A. I remember this, yes.

01:35:33 4 Q. Now, you understand that the Plaintiff in this case is

01:35:38 5 claiming that the 2017 filed patent claims that are subject

01:35:44 6 to this lawsuit were actually invented back in October of

01:35:51 7 2006, right?

01:35:52 8 A. Yes, and I agree with them.

01:35:54 9 Q. Okay.

01:35:58 10 MR. MELSHEIMER: Your Honor, I'm going to object

01:36:00 11 to the last answer, "I agree with that," as non-responsive,

01:36:05 12 as well as outside the scope of his report.

01:36:09 13 THE COURT: I'll sustain the non-responsive

01:36:11 14 objection.

01:36:12 15 MR. MELSHEIMER: Can the -- can the answer be

01:36:14 16 struck, as well, Your Honor?

01:36:16 17 THE COURT: I'll order it struck as

01:36:18 18 non-responsive.

01:36:19 19 Q. (By Mr. Melsheimer) Now, this is an opening slide

01:36:26 20 that's titled USAA created consumer device remote deposit.

01:36:32 21 Do you see that?

01:36:32 22 A. Yes.

01:36:33 23 Q. Now, this is from something that happened in 2 -- this

01:36:36 24 was from an article in 2009, correct?

01:36:38 25 A. It says that, yes.

01:36:40 1 Q. Not 2006, right?

01:36:42 2 A. Yes.

01:36:43 3 Q. Now, you also saw --

01:36:46 4 MR. MELSHEIMER: Do we have Slide PDX-1.9?

01:36:51 5 Q. (By Mr. Melsheimer) Now, this is a New York Times
01:36:56 6 article from August 2009, right?

01:36:59 7 A. Yes.

01:37:00 8 Q. And it does reference 2006 indirectly, doesn't it, sir?

01:37:07 9 A. Yes, it does.

01:37:13 10 Q. It's highlight -- it's underlined in red, isn't it,
01:37:18 11 sir?

01:37:18 12 A. Three years ago, yes.

01:37:20 13 Q. Three years ago from 2009 is 2006. But that sentence
01:37:27 14 is not talking about mobile phone deposit, right, sir?

01:37:31 15 A. I don't quite agree.

01:37:34 16 Q. Why -- why don't we read it together?

01:37:37 17 Three years ago -- are you with me?

01:37:39 18 A. Yes.

01:37:40 19 Q. It -- that's USAA, right?

01:37:42 20 A. Yes.

01:37:42 21 Q. Introduced the option of depositing a check from home
01:37:47 22 using a scanner, right?

01:37:50 23 A. Yes.

01:37:51 24 Q. Then it says that laid the groundwork for the phone
01:37:55 25 deposit feature which USAA claims to offer on phones this

01:37:57 1 year, which would be 2009, right?

01:37:59 2 A. Yes.

01:38:02 3 Q. All right. I want to talk to you a little bit about
01:38:06 4 your infringement position, sir.

01:38:07 5 First of all, I assume it's your view that the
01:38:12 6 claims in this case are broad enough to cover a mobile or
01:38:16 7 smartphone, right?

01:38:18 8 A. That's my opinion, yes.

01:38:19 9 Q. That the claims of both patents are broad enough to
01:38:26 10 cover a mobile phone or smartphone, right?

01:38:29 11 A. Well, they refer to a mobile device, and a smartphone
01:38:32 12 is a mobile device.

01:38:33 13 Q. So you agree that the claims are broad enough to cover
01:38:37 14 a smartphone, right?

01:38:37 15 A. Yes.

01:38:38 16 Q. Now, I want to focus your attention on the '681 patent,
01:38:52 17 Claims 12 and 30. Are you with me?

01:38:55 18 A. Yes.

01:38:55 19 Q. Okay. I'm not going to pull them up at just this
01:38:59 20 moment, but that's where I'm headed, and I want you to have
01:39:02 21 that in your mind.

01:39:03 22 In -- in doing your analysis for this case, it was
01:39:07 23 important for you to understand where certain things
01:39:11 24 happened in Wells Fargo's system, right?

01:39:15 25 A. Yes.

01:39:16 1 Q. That's because in MRDC, and that stands for mobile

01:39:21 2 remote deposit capture, right?

01:39:22 3 A. Yes.

01:39:25 4 Q. Some things happen on the user's device, true?

01:39:31 5 A. Yes.

01:39:32 6 Q. And some things happen on servers -- I'm going to say

01:39:44 7 back at Wells Fargo?

01:39:46 8 A. Yes.

01:39:47 9 Q. And those servers could be 10 miles away from the user,

01:39:53 10 a thousand miles away from the user, could be anywhere

01:39:56 11 remote from the user, right?

01:39:57 12 A. Yes. They're interconnected, of course.

01:40:00 13 Q. Understood. But, physically, the servers that are in

01:40:08 14 the Wells Fargo side of the house, those could be located

01:40:10 15 anywhere in the country, true?

01:40:11 16 A. Yes. I don't know if regulators allow them to be out

01:40:17 17 of the country or not.

01:40:19 18 Q. And if you look -- can -- do you have your report

01:40:24 19 there, sir?

01:40:24 20 A. I do.

01:40:24 21 Q. Can you look at Paragraph 73 of your report? And I'm

01:40:33 22 going to display the chart that you created, for the jury's

01:40:35 23 benefit.

01:40:36 24 MR. MELSHEIMER: Mr. Bakale, if we can.

01:40:48 25 Q. (By Mr. Melsheimer) It's also on the screen. Is

01:40:50 1 what's on the screen, sir, a -- an accurate representation
01:40:56 2 of what's in your report?

01:40:57 3 A. It is a picture of what's in my report, yes.

01:41:00 4 Q. Okay. And so what you've got here is you've got on the
01:41:05 5 bottom left, you've got a picture of a phone, right?

01:41:07 6 A. Yes.

01:41:07 7 Q. And then you've got these various boxes that some of
01:41:11 8 them -- boxes that represent different servers, right?

01:41:16 9 A. They're actually software components on the right, if
01:41:20 10 that's what you're referring to.

01:41:21 11 Q. Well, you've got the TMS server, the OPSCON server --

01:41:21 12 A. I see.

01:41:27 13 Q. -- I'm just reading the words you used, sir.

01:41:29 14 A. Yes. Those are -- those are servers, the -- the titles
01:41:31 15 are referring to the software that they're running.

01:41:34 16 Q. Okay. Just so you and I are on the same page, those
01:41:38 17 boxes are servers with software that you've identified
01:41:44 18 running on those servers, right?

01:41:45 19 A. That's correct.

01:41:46 20 Q. And a server is a specialized computer, correct?

01:41:49 21 A. It's a -- no, I would characterize it as a general
01:41:54 22 purpose computer.

01:41:54 23 Q. Okay. Let me rephrase the question, I'm sorry.

01:41:57 24 A server is a -- is a general purpose computer
01:42:03 25 that may be tasked with a specific role or function, fair?

01:42:06 1 A. Running a certain app, yes.

01:42:08 2 Q. And the apps that you have there are the ones titled

01:42:14 3 OPSCON and TMS?

01:42:19 4 A. Yes.

01:42:19 5 Q. Okay.

01:42:20 6 A. Among others.

01:42:21 7 Q. Among others. You've got a server from a company

01:42:24 8 called Mitek, right?

01:42:25 9 A. Yes, and then there's WIBTP CheckDeposit.

01:42:32 10 Q. Those are all different softwares and pieces of

01:42:36 11 equipment that are separate from the mobile phone that you

01:42:39 12 have down there on the bottom left, right?

01:42:41 13 A. Well, they are interconnected as a system, but, yes.

01:42:44 14 Q. Right. But you've got arrows going from one to the

01:42:48 15 other because they're in different places, right?

01:42:51 16 A. Sure.

01:43:00 17 Q. And, indeed, to your knowledge, there are multiple

01:43:03 18 servers at various Wells Fargo sites that are involved in

01:43:10 19 MRDC, right?

01:43:10 20 A. There may be one or more, yes.

01:43:12 21 Q. Now, you wanted to know how things worked in the

01:43:18 22 system, right?

01:43:19 23 A. Yes.

01:43:20 24 Q. So one of the things you did is you and some of your

01:43:25 25 colleagues or assistants looked at the Wells Fargo source

01:43:32 1 code, right?

01:43:33 2 A. Correct.

01:43:33 3 Q. And you made reference to something earlier called a
01:43:36 4 protective order, and I just want to make sure we're on the
01:43:38 5 same page about that. That's an order that allows both
01:43:42 6 sides in a case like this to exchange information that
01:43:47 7 either side may view as confidential, right?

01:43:50 8 A. Well, I -- I'm sorry. Maybe I wasn't specific. I was
01:43:54 9 referring to my aspect of the protective order that I
01:43:57 10 signed that gave me access to the other side's confidential
01:44:03 11 information.

01:44:03 12 Q. But you know, sir, because you've done this before in
01:44:06 13 other lawsuits, you know that Dr. Villasenor, you see him
01:44:09 14 here in the front row?

01:44:11 15 A. Yes.

01:44:12 16 Q. He signed a protective order, too, right?

01:44:15 17 A. It's my understanding, yes.

01:44:16 18 Q. So that he could get information, if he wanted to, that
01:44:20 19 USAA said was confidential, right?

01:44:21 20 A. Yes.

01:44:22 21 Q. Right. So I'm just trying to straight -- there's --
01:44:24 22 there's an equality here of -- of protections on both
01:44:28 23 sides, fair?

01:44:29 24 A. Yes.

01:44:32 25 Q. Just for a moment since we're on Dr. -- Dr. Villasenor,

01:44:40 1 teaches similar stuff to what you teach?

01:44:42 2 A. Generally.

01:44:46 3 Q. Works at a very reputable university?

01:44:51 4 A. It's pretty good.

01:44:52 5 Q. Not as good as Georgia Tech?

01:44:54 6 A. No, but it's pretty good.

01:44:56 7 Q. All right. UCLA?

01:44:57 8 A. Yeah.

01:44:58 9 Q. He went to Stanford. Is that pretty good?

01:45:00 10 A. That's pretty good.

01:45:01 11 Q. University of Virginia, that's pretty good?

01:45:03 12 A. Yeah, pretty good.

01:45:05 13 Q. So he's got -- same or similar credentials to what you
01:45:09 14 have -- let the record reflect that you're laughing.

01:45:12 15 A. John is, too.

01:45:13 16 Q. Same or similar credentials. You don't -- you don't
01:45:15 17 question -- and we'll hear from Dr. Villasenor later -- but
01:45:17 18 you don't question any of his credentials to offer the
01:45:21 19 opinions he's going to offer in this case, you just
01:45:23 20 disagreed with them?

01:45:24 21 A. Correct. He's misguided.

01:45:26 22 Q. And he thinks you're misguided?

01:45:29 23 A. I haven't heard from him yet.

01:45:31 24 THE COURT: Let's try to get a straight question
01:45:33 25 and a straight answer without all this editorial add-on

01:45:38 1 from both sides, all right?

01:45:40 2 THE WITNESS: Yes, Your Honor.

01:45:41 3 THE COURT: Let's go forward.

01:45:42 4 MR. MELSHEIMER: Yes, Your Honor.

01:45:43 5 Q. (By Mr. Melsheimer) You reviewed a lot of source code,
01:45:46 6 true?

01:45:47 7 A. Yes, that's true.

01:45:49 8 Q. You or people on your behalf did it, right?

01:45:53 9 A. Yes, that's true.

01:45:56 10 Q. And that is something that you -- that sort of -- you
01:46:01 11 did that among other work, and you came up with this
01:46:06 12 architectural diagram in Paragraph 78 of your report. And
01:46:11 13 I'm going to ask you to look at that, sir.

01:46:13 14 A. Yes, I did.

01:46:14 15 Q. And are we showing the jury now a correct copy of -- or
01:46:23 16 an image of Paragraph 78 of your report?

01:46:25 17 A. Yes.

01:46:29 18 Q. So you've got three boxes here, right?

01:46:35 19 A. Yes.

01:46:35 20 Q. Probably got more than three boxes. I'm talking about
01:46:38 21 the big ones that are shaded in blue?

01:46:40 22 A. I assume that's what you meant.

01:46:42 23 Q. And they're separated by some white space, correct?

01:46:46 24 A. That's correct.

01:46:46 25 Q. And on the left-hand side, you've got a box -- a square

01:46:51 1 that says mobile device, and you've got a bunch of
01:46:54 2 components in that box, correct?

01:46:58 3 A. Yes, those are different software components.

01:47:02 4 Q. And then in the middle, you've got a rectangle that is
01:47:06 5 to check deposit server domain, and that's got a number of
01:47:11 6 components in it, as well, true?

01:47:13 7 A. That's correct.

01:47:13 8 Q. And then on the right-hand side, you've got these
01:47:17 9 remote servers with, again, a number of components --
01:47:22 10 again, separate from what you've connected to but separate
01:47:26 11 from the mobile device square on the far left, right?

01:47:31 12 A. That's correct.

01:47:31 13 Q. So what you're describing on the left is what we would
01:47:35 14 think of as our mobile phone or smartphone, right?

01:47:38 15 A. Not exactly.

01:47:42 16 Q. Well, you label it mobile device?

01:47:45 17 A. Well, what I'm describing is the architecture of the
01:47:50 18 software that is executing on that device.

01:47:52 19 Q. So on the left-hand side, you've got boxes for the
01:47:55 20 software that execute on the mobile device; is that -- is
01:47:58 21 that what you're telling us?

01:47:59 22 A. Yes.

01:48:00 23 Q. And on the right-hand side, you've got the software and
01:48:04 24 components that are being executed somewhere else, fair?

01:48:07 25 A. On the servers, yes.

01:48:09 1 Q. So let's take a look at the middle rectangle -- but the
01:48:18 2 Wells Fargo's check deposit server, that -- that does
01:48:22 3 things like, you've got here, holds the transaction
01:48:27 4 information and images. Do you see that?

01:48:29 5 A. Yes.

01:48:29 6 Q. Is -- is that -- by transaction information, do you
01:48:33 7 mean things like the amount of the check, the date, things
01:48:37 8 of that nature?

01:48:38 9 A. Yes, that log file.

01:48:45 10 Q. And then you have something called a transaction
01:48:48 11 manager storing active transactions. So is that all before
01:48:51 12 the deposit is finalized and -- and before -- and before
01:48:58 13 it's still -- the item is processed within the bank's
01:49:02 14 internal systems?

01:49:04 15 A. It depends on the amount of the check.

01:49:10 16 Q. So it could -- let's say it's a \$10,000.00 check. How
01:49:14 17 does that change your answer?

01:49:15 18 A. Yes. So there would be a certain amount credited in
01:49:21 19 the check deposit server, and then there would be a delay.
01:49:24 20 And then OPSCON and another server called Hogan would do
01:49:30 21 the actual depositing.

01:49:32 22 Just, since we're here, let me note that the red
01:49:34 23 blocks are areas where I did not get source code.

01:49:45 24 Q. There's still other parts of the servers that handle
01:49:48 25 other parts of the process, like image analysis on the far

01:49:54 1 right. Do you see that, sir?

01:49:55 2 A. Yes.

01:49:55 3 Q. And then the actual check submission process on the

01:50:02 4 OPSCON server; do you see that?

01:50:04 5 A. Yes.

01:50:05 6 Q. Now, this is not the entire architecture of the check

01:50:11 7 processing process, is it, sir?

01:50:12 8 A. No, again, I didn't have all the software components

01:50:16 9 available to me.

01:50:17 10 Q. Well, that's not really what I'm referring to, sir.

01:50:20 11 You had -- you had what you thought you needed to

01:50:26 12 make your conclusions in this case, right?

01:50:27 13 A. I did the best I could with what I had on hand.

01:50:30 14 Q. What I'm talking about is the architecture of the back

01:50:34 15 end systems that you and I talked about a minute ago. You

01:50:36 16 don't have that laid out here in your report, correct?

01:50:38 17 A. No, I don't think that's -- that's quite true. Sorry.

01:50:45 18 I do talk about what happens in the back end in detail.

01:50:48 19 Q. Right. I'm -- I'm -- what I'm asking you, sir, though,

01:50:51 20 is these charts do not reflect all the different things

01:50:55 21 that are occurring, the components, the functionality in

01:50:59 22 the software in the back end system?

01:51:01 23 A. Right. I did not refer to anything I didn't need for

01:51:06 24 my analysis.

01:51:07 25 Q. Fair enough. But I just want to make sure you and I

01:51:10 1 are on the same page. This chart on Paragraph 78 does not
01:51:14 2 include what you and I have agreed is the back end system
01:51:19 3 of item processing, fair?

01:51:20 4 A. I don't think that's quite fair.

01:51:28 5 Q. I want to make sure I'm being fair with you, sir. So
01:51:32 6 let me -- let me -- let me rephrase the question a little
01:51:35 7 bit.

01:51:36 8 There are things that happen in the bank's
01:51:38 9 internal systems regarding item processing that you have
01:51:41 10 not documented here in Paragraph 78; is that fair?

01:51:45 11 A. Yes.

01:51:45 12 Q. Now, let's take a look at the '681 patent, Claim 30.

01:51:58 13 Now, it's -- it's a long claim, sir, but I want --
01:52:07 14 I want to focus you on the steps following the phrase,
01:52:14 15 causes the customer's mobile device to perform, in
01:52:18 16 Claim 30. Do you see that, sir?

01:52:20 17 A. I do.

01:52:21 18 Q. So -- so you and I are communicating, a non-transitory
01:52:29 19 computer-readable medium storing an app, that's this
01:52:34 20 software program that you described on your direct
01:52:35 21 examination, right?

01:52:37 22 A. Yes.

01:52:37 23 Q. That when downloaded and run by a customer's mobile
01:52:43 24 device causes the con -- customer's mobile device to
01:52:49 25 perform, right?

01:52:50 1 A. That's exactly what the claim says.

01:52:52 2 Q. And then there are seven steps that follow that in
01:53:00 3 Claim 30, right?

01:53:01 4 A. Yes.

01:53:01 5 Q. There is, one, the instructing step. You see that?

01:53:07 6 A. Yes.

01:53:08 7 Q. And, two, a displaying step?

01:53:11 8 A. Yes.

01:53:12 9 Q. Then a giving step?

01:53:13 10 A. Giving an instruction. Let's be --

01:53:17 11 Q. You want to say, giving an instruction.

01:53:19 12 Presenting -- a presenting step?

01:53:21 13 A. Presenting the photos, yes.

01:53:23 14 Q. Confirming. Do you see that?

01:53:27 15 A. Yes.

01:53:27 16 Q. Then there's a checking for errors step?

01:53:35 17 A. Yes.

01:53:35 18 Q. And then there's the final step, No. 7, using a
01:53:38 19 wireless network transmitting the check and submitting it
01:53:44 20 for deposit after certain things have happened, right?

01:53:47 21 A. That's right.

01:53:54 22 Q. So we -- to satisfy Claim 30, we need an app, a piece
01:53:57 23 of software, that causes the customer's mobile device to
01:54:03 24 perform those seven steps, right?

01:54:07 25 A. That's correct.

01:54:11 1 Q. Now, let's focus on one of those steps beginning with
01:54:14 2 the word "confirming." I'm calling that Step 5, but we're
01:54:18 3 going to call it the confirming step. Are you with me?

01:54:21 4 A. Yes.

01:54:22 5 Q. So this is confirming that the mobile check deposit can
01:54:27 6 go forward after optical character recognition is performed
01:54:33 7 on the check. I'm going to pause there for a minute. Did
01:54:36 8 I read that correctly?

01:54:37 9 A. Yes, you did.

01:54:37 10 Q. Optical character recognition, that's OCR, right?

01:54:40 11 A. That's correct.

01:54:42 12 Q. The optical character recognition -- continuing --
01:54:51 13 determining an amount of the check and reading a magnetic
01:54:59 14 ink character recognition line.

01:55:00 15 That's MICR, right?

01:55:02 16 A. Yes.

01:55:02 17 Q. Now, can we agree, sir, that this claim requires the
01:55:13 18 portable device to do the confirming?

01:55:17 19 A. Yes.

01:55:19 20 Q. And that's because, if we go up to the beginning, we've
01:55:23 21 got that language, "causes the customer's mobile device to
01:55:28 22 perform," and then this is one of the steps that is caused
01:55:31 23 to be performed, right?

01:55:33 24 A. Yes.

01:55:34 25 Q. And we can agree that in Wells Fargo's system, the OCR

01:55:43 1 of the amount of the check -- are you with me?

01:55:47 2 A. Yes.

01:55:47 3 Q. Is not performed on the portable device, true?

01:55:51 4 A. I don't think that's quite accurate.

01:55:59 5 Q. Comparing the OCR-determined amount to the amount

01:56:04 6 indicated by the user is not performed on the mobile

01:56:07 7 device; is that correct?

01:56:09 8 A. I wouldn't say that was quite accurate.

01:56:11 9 Q. Have you ever given a different answer?

01:56:13 10 A. So the mobile device causes that to occur.

01:56:26 11 Q. So, Dr. Conte, let me -- let me ask that question

01:56:30 12 again.

01:56:30 13 Have you ever given a different answer to that
01:56:33 14 question?

01:56:34 15 A. I might have.

01:56:34 16 Q. Okay. Let me take a look at your deposition if you
01:56:37 17 would? You have a copy --

01:56:38 18 MR. ROWLES: Your Honor, I object. It's not
01:56:40 19 proper impeachment. No inconsistent statement has been
01:56:46 20 made.

01:56:46 21 MR. MELSHEIMER: I just asked him to look at his
01:56:50 22 deposition, Your Honor.

01:56:52 23 THE COURT: Yeah. I think your objection is
01:56:55 24 premature, counsel. It's overruled.

01:56:58 25 MR. MELSHEIMER: Your Honor, may I have a moment?

01:57:00 1 THE COURT: Take a moment.

01:57:11 2 Q. (By Mr. Melsheimer) Do you have your deposition up
01:57:12 3 there, sir?

01:57:12 4 A. I don't believe so.

01:57:13 5 Q. Okay. Let me -- let me provide it to you.

01:57:35 6 MR. MELSHEIMER: May I approach the Court Security
01:57:37 7 Officer, Your Honor, to hand these --

01:57:39 8 THE COURT: You may -- you may approach.

01:57:51 9 MR. MELSHEIMER: Now, without -- without
01:57:53 10 displaying anything, Mr. Bakale, I would like --

01:57:58 11 Q. (By Mr. Melsheimer) Dr. Conte, would you look at your
01:58:00 12 deposition?

01:58:00 13 A. Which tab is that?

01:58:04 14 Q. It's -- the tabs are identified on the side. I don't
01:58:08 15 know which -- I don't know if they're numbered, but it
01:58:10 16 should say deposition.

01:58:11 17 A. It's this, Tab 2?

01:58:27 18 Q. Yes, sir.

01:58:27 19 A. Okay.

01:58:28 20 Q. Page 123, Lines 5 to 13. And would you just read that
01:58:28 21 to yourself, Dr. Conte, and then tell me when you've
01:58:35 22 finished at Line 120 -- Page 123, Lines 5 to 13?

01:58:39 23 A. Yes. Okay.

01:58:55 24 Q. Does that refresh your recollection, sir, that -- that
01:58:57 25 in the Wells Fargo product, comparing the OCR-determined

01:59:02 1 amount to the amount indicated by the user is not performed
01:59:06 2 on the portable device?

01:59:08 3 A. Yes, I believe that's accurate.

01:59:10 4 Q. Can we also agree, sir, that the portable device or the
01:59:24 5 mobile phone here does not include the logic that
01:59:29 6 determines whether or not the deposit can go forward?

01:59:32 7 A. The logic? Yeah, that's right, the logic is on the
01:59:48 8 server. The confirming is on the phone.

01:59:50 9 Q. The logic that determines whether or not the deposit
01:59:53 10 can go forward is done on the server; is that correct,
01:59:58 11 Dr. Conte?

01:59:58 12 A. The logic is on the server, the confirming is on the
02:00:02 13 phone, so, yes.

02:00:03 14 Q. In Wells Fargo's system, the only component that is
02:00:10 15 deciding whether or not deposit can go forward is the
02:00:16 16 server; isn't that right, sir?

02:00:18 17 A. Again, the server has the logic, the phone confirms to
02:00:28 18 the user.

02:00:29 19 Q. Let me ask this -- let me -- let me make sure I'm
02:00:33 20 understanding your answer, sir.

02:00:35 21 Isn't it true, Dr. Conte, that the only device
02:00:38 22 that is deciding whether or not the check deposit can go
02:00:42 23 forward is the server?

02:00:50 24 A. The server does the decision. I'm just -- I'm trying
02:00:53 25 to be -- no, I wouldn't exactly agree with that, I'm sorry.

02:00:57 1 Q. All right, sir. If you look at Page 128 of your
02:01:00 2 deposition, Line 24, to 129, Line 5.

02:01:18 3 A. This -- this matches what I've been answering, sir.

02:01:21 4 Q. Did you say that the only device that is deciding
02:01:28 5 whether or not the check deposit can go forward is the
02:01:32 6 server?

02:01:32 7 Yes, that's correct.

02:01:33 8 Was that your answer, sir?

02:01:35 9 A. The decision, yes.

02:01:49 10 MR. MELSHEIMER: All right. Let's take a look at
02:01:51 11 Claim 12, which is a little bit shorter than Claim 30.

02:01:56 12 THE COURT: Mr. Melsheimer, it really doesn't
02:01:58 13 serve any purpose for you to tell the jury whether it's
02:02:01 14 shorter or longer. If we could just have questions and
02:02:04 15 answers, it would be helpful.

02:02:06 16 MR. MELSHEIMER: Thank you, Your Honor.

02:02:06 17 THE COURT: If you'll avoid those kind of sidebar
02:02:10 18 comments, please.

02:02:11 19 MR. MELSHEIMER: I will, Your Honor.

02:02:14 20 Q. (By Mr. Melsheimer) Let me know when you're at
02:02:16 21 Claim 12, sir.

02:02:17 22 A. It's on the display.

02:02:18 23 Q. Okay. In Claim 12, there's this confirming step again.
02:02:27 24 Do you see that, sir?

02:02:28 25 A. It's not the exact same step, sir.

02:02:32 1 Q. I didn't mean to suggest it was, sir. But can you --
02:02:35 2 are you -- are you with me on the -- on the confirming
02:02:38 3 step?

02:02:38 4 A. Could you be a little bit more precise?

02:02:42 5 Q. The -- the clause of the -- of Claim 12 that starts out
02:02:49 6 "confirming" that I have highlighted -- are you with me?

02:02:51 7 A. Yes.

02:02:53 8 Q. So it says: Confirming that the mobile check deposit
02:02:56 9 can go forward after the system performs optical character
02:03:03 10 recognition on the check, the optical character recognition
02:03:07 11 determining an amount of the check and reading a magnetic
02:03:13 12 ink character recognition MICR line.

02:03:13 13 Did I read that correctly?

02:03:15 14 A. You did.

02:03:17 15 Q. Now, the -- the -- so focusing on this confirming step,
02:03:23 16 the claims of the '681 patent require the portable device
02:03:29 17 to do the confirming; isn't that right, sir?

02:03:32 18 A. Yes.

02:03:37 19 Q. But in the Wells Fargo system, the portable device does
02:03:46 20 not include the logic that determines whether or not the
02:03:50 21 deposit can go forward; isn't that correct?

02:03:55 22 A. That isn't the opposite of what you said. So, no, I
02:04:00 23 can't agree to that.

02:04:01 24 Q. Well, let me clarify it then if I -- if I -- focusing
02:04:05 25 on the Wells Fargo system, the portable device does not

02:04:09 1 include the logic that determines whether or not the
02:04:12 2 deposit can go forward; is that correct?

02:04:16 3 A. It does not -- the portable device does not include the
02:04:19 4 logic, however, it's not here.

02:04:23 5 Q. But the claims require the portable device do the
02:04:26 6 confirming. Do I have that right?

02:04:30 7 A. Those aren't the same thing. I can't agree to that,
02:04:33 8 I'm sorry.

02:04:34 9 Q. Let me make sure we're communicating.

02:04:37 10 The claims of the '681 patent require the portable
02:04:41 11 device to do the confirming; is that correct or is that not
02:04:44 12 correct?

02:04:45 13 A. The claims do not require the logic to occur on the
02:04:51 14 portable device.

02:04:58 15 MR. MELSHEIMER: Objection, nonresponsive, Your
02:05:00 16 Honor.

02:05:00 17 THE COURT: Overruled.

02:05:16 18 Q. (By Mr. Melsheimer) The logic that does the deciding
02:05:36 19 with respect to whether a deposit can go forward is on the
02:05:39 20 Wells Fargo servers and not on the mobile device; is that
02:05:45 21 correct?

02:05:45 22 A. Yes, that's correct. The claims don't call out that
02:05:48 23 logic.

02:05:52 24 THE COURT: Dr. Conte --

02:05:53 25 MR. MELSHEIMER: I'm going to object --

02:05:54 1 THE COURT: -- he didn't ask you if the claims
02:05:56 2 called out that logic. You just added that. You answered
02:05:59 3 the question when you said, yes, that's correct.

02:06:02 4 THE WITNESS: I'm sorry, Your Honor.

02:06:02 5 THE COURT: You're going to need to limit your
02:06:04 6 answers to the questions asked. These -- these gratuitous
02:06:10 7 add-ons are just not helpful. Mr. Rowles is going to get a
02:06:14 8 chance to ask you more questions, and we all know that. So
02:06:17 9 let's rely on that and limit your answers to the questions
02:06:21 10 asked, okay?

02:06:22 11 THE WITNESS: Yes, Your Honor. My apologies.

02:06:24 12 THE COURT: That's all right.

02:06:25 13 Go ahead, Mr. Melsheimer.

02:06:27 14 Q. (By Mr. Melsheimer) There are other claims in the '681
02:06:30 15 patent that you went over on your direct examination that
02:06:33 16 are what's called dependent claims, right?

02:06:34 17 A. Yes.

02:06:35 18 Q. Claim 12 and Claim 30 are so-called independent claims,
02:06:40 19 right?

02:06:40 20 A. Yes, that's true.

02:06:42 21 Q. So if a claim depends on Claim 12, and Claim 12 is not
02:06:54 22 infringed, then the dependent claim is not infringed
02:06:56 23 either. Do I have that right?

02:06:58 24 A. Yes, that's true.

02:06:59 25 Q. And so if Claim 30 is not infringed, then any claim

02:07:03 1 dependent on Claim 30 is, by definition, not infringed

02:07:08 2 either. Do I have that right?

02:07:09 3 A. Hypothetically.

02:07:10 4 Q. Now, you told us in your report that you're not an

02:07:25 5 attorney, but you -- you do have a -- some knowledge about

02:07:32 6 patent law, right?

02:07:33 7 A. What has been explained to me, yes.

02:07:37 8 Q. And you often rely on lawyers in a case you're working

02:07:41 9 on to help explain to you their understanding of the law,

02:07:44 10 fair?

02:07:44 11 A. Fair.

02:07:47 12 MR. MELSHEIMER: Your Honor, may I have just a

02:07:49 13 moment?

02:07:49 14 THE COURT: You may.

02:08:33 15 Are you ready to proceed, counsel?

02:08:35 16 MR. MELSHEIMER: I am, Your Honor. May it please

02:08:36 17 the Court.

02:08:36 18 Q. (By Mr. Melsheimer) Just a few more things, Dr. --

02:08:45 19 Dr. Conte. You understand that with respect to the '605

02:08:47 20 patent and the '681 patent, that in both of those patents,

02:08:52 21 there are steps done by different parties within the

02:08:56 22 claims, right?

02:08:56 23 A. Yes, I -- there are items done by different parties,

02:09:05 24 yes.

02:09:05 25 Q. And that's sometimes referred to as divided

02:09:09 1 infringement. Have you heard that?

02:09:10 2 A. I've become familiar with the term, yes.

02:09:14 3 Q. And when you have multiple parties involved in an
02:09:18 4 infringement claim, there are certain legal rules that must
02:09:21 5 be applied. Do you understand that?

02:09:25 6 A. Yes.

02:09:26 7 Q. You don't purport or claim to be an expert in those
02:09:30 8 legal rules, right?

02:09:31 9 A. I am not.

02:09:32 10 Q. You didn't -- you didn't purport on your direct
02:09:35 11 examination to apply any of those legal rules in the
02:09:39 12 divided infringement context, did you, sir?

02:09:42 13 A. Let me -- thinking -- let me think back. I don't think
02:09:50 14 that's accurate.

02:09:53 15 Q. Well, do you recall -- on your direct examination, did
02:09:57 16 you, for example, do an element-by-element analysis of the
02:10:02 17 benefits of the -- the elements of the claimed system? Did
02:10:08 18 you do that on your direct examination?

02:10:10 19 A. On my direct examination, I believe I did.

02:10:15 20 Q. You -- you think in your direct examination, you went
02:10:18 21 through each element and explained how it benefitted the
02:10:22 22 bank versus how it benefitted the customer?

02:10:24 23 A. Oh, no, I didn't do that.

02:10:30 24 Q. Okay. So just a few final questions, sir. You -- you
02:10:34 25 have a slide --

02:10:36 1 MR. MELSHEIMER: Can we -- can we pull up

02:10:46 2 PDX-2.33?

02:10:46 3 Q. (By Mr. Melsheimer) This is -- was in your direct
02:10:50 4 examination, right?

02:10:51 5 A. Yes.

02:10:51 6 Q. And I just want to clarify something. You said Wells

02:10:56 7 Fargo customers must download and install a compatible

02:11:01 8 version of the mobile -- the Wells Fargo mobile app. What

02:11:04 9 you mean by that is, if they want to participate in mobile

02:11:08 10 banking, they have to do that, right?

02:11:10 11 A. Specifically, mobile remote check deposit, yes.

02:11:14 12 Q. You can be a Wells Fargo customer and never participate

02:11:17 13 in mobile banking, right?

02:11:18 14 A. In mobile remote check deposit, yes.

02:11:21 15 Q. If you decide as a customer that you don't want to

02:11:24 16 download that app to your phone, you don't have to do it,

02:11:28 17 right?

02:11:28 18 A. That's correct.

02:11:39 19 MR. MELSHEIMER: And if we go to Slide PDX-2.29.

02:11:43 20 Q. (By Mr. Melsheimer) This is another slide from your

02:11:47 21 direct examination, sir. Do you recall it?

02:11:49 22 A. Yes.

02:11:49 23 Q. Now, the slide says: Wells Fargo software controls the

02:11:58 24 entire deposit process. I just want to ask you this

02:12:01 25 question: There's no deposit unless the customer initiates

02:12:07 1 an action to make a deposit, right?

02:12:12 2 A. There's no deposit, that's correct.

02:12:14 3 Q. I mean, that's just common sense, right, if you don't
02:12:18 4 try to deposit a check, it doesn't get deposited within the
02:12:23 5 mobile deposit or any channel at Wells Fargo, right?

02:12:26 6 A. That's correct.

02:12:27 7 Q. The customer has to make that decision themselves,
02:12:33 8 right?

02:12:33 9 A. Correct.

02:12:41 10 MR. MELSHEIMER: Can we pull up Slide PDX-2.31?

02:12:46 11 Q. (By Mr. Melsheimer) It's your opinion, sir, that the
02:13:04 12 Wells Fargo Mobile Deposit product system infringes the
02:13:08 13 '605 and the '681 patents, as you've indicated, right?

02:13:12 14 A. Yes.

02:13:12 15 Q. And you contend that every version of the Wells Fargo
02:13:19 16 Mobile Deposit system dating back to 2014 infringes the
02:13:25 17 '605 and the '681 patent, right?

02:13:27 18 A. That's not precise.

02:13:28 19 Q. Well, take a look at May 2014, Version 2.0.6; do you
02:13:37 20 see that, sir?

02:13:38 21 A. Yes.

02:13:39 22 Q. And July 2014, Version 2.0.6?

02:13:44 23 A. For Android, yes.

02:13:46 24 Q. And the title of your slide is All Wells Fargo Mobile
02:13:53 25 Deposit Software Uses USAA Technology?

02:13:56 1 A. That is the title, yes.

02:13:57 2 Q. And by -- what you mean by that is, is the claims of
02:14:02 3 the '605 and the '681 patent that you've identified for the
02:14:04 4 jury, true?

02:14:05 5 A. No. I'm saying that they use the patented technology.
02:14:15 6 I'm not making a determination about infringement.

02:14:19 7 Q. Well --

02:14:21 8 A. I can't.

02:14:23 9 Q. The element-by-element analysis that you did on your
02:14:25 10 direct examination --

02:14:29 11 A. Yes.

02:14:29 12 Q. -- are you with me?

02:14:31 13 A. Yes.

02:14:31 14 Q. That would apply to the Wells Fargo product back in
02:14:36 15 2014 on the iPhone and July 2014 on the Android phone;
02:14:36 16 isn't that right?

02:14:41 17 A. Yes, it is.

02:14:42 18 Q. And so, sir, if, in fact, USAA is entitled only to the
02:15:02 19 filing date as a priority date for its two patents in this
02:15:06 20 case; are you with me?

02:15:07 21 A. Yes.

02:15:08 22 Q. If they're entitled to that July 28, 2017, date, then
02:15:17 23 isn't it the case, sir, that Wells Fargo's own product
02:15:21 24 would anticipate the asserted claims of these two patents?

02:15:25 25 MR. ROWLES: I object, Your Honor.

02:15:26 1 MR. SHEASBY: Can we approach, Your Honor?

02:15:27 2 THE COURT: Approach the bench.

02:15:28 3 (Bench conference.)

02:15:37 4 MR. ROWLES: This is introducing --

02:15:38 5 THE COURT: Just a minute.

02:15:39 6 MR. ROWLES: Yes, sir.

02:15:40 7 THE COURT: Go ahead.

02:15:40 8 MR. ROWLES: This is introducing an unasserted

02:15:44 9 anticipation defense. No expert -- no -- no discovery

02:15:49 10 disclosure in this case that contends that the Wells Fargo

02:15:51 11 system --

02:15:51 12 THE COURT: Speak up a little bit.

02:15:52 13 MR. ROWLES: There's been no disclosure in this

02:15:54 14 case --

02:15:55 15 THE COURT: All right. Just a minute. I can't
02:15:56 16 hear him while you're whispering to him. Let's have one at
02:16:00 17 a time up here, gentlemen.

02:16:01 18 MR. ROWLES: There's been no disclosure in this
02:16:03 19 case, Your Honor, at any point in discovery of a theory
02:16:05 20 that the Wells Fargo system prior to 2017 is invalidating
02:16:10 21 prior art for these patents at any point. And to inject
02:16:12 22 that into this case at this point is just irrelevant and
02:16:17 23 highly prejudicial.

02:16:17 24 THE COURT: It's not an elected prior art --

02:16:20 25 MR. ROWLES: It is not.

02:16:20 1 THE COURT: -- even if your priority date is later
02:16:20 2 in time?

02:16:23 3 MR. SHEASBY: It is not an elected prior art
02:16:24 4 source, and it's not something that's in -- in their
02:16:26 5 contentions.

02:16:28 6 THE COURT: Let me hear a response.

02:16:30 7 MR. MELSHEIMER: It is -- can I let Mr. Bittner
02:16:30 8 respond, Your Honor?

02:16:30 9 THE COURT: No, he's your witness.

02:16:30 10 MR. MELSHEIMER: Thank you, Your Honor.

02:16:31 11 It is in our invalidity contentions, Your Honor.
02:16:35 12 I understand that this was the exact -- this was the exact
02:16:40 13 invalidity theory that I understand Your Honor understood
02:16:43 14 us to be asserting back in chambers last night, which is if
02:16:46 15 they're not entitled to this earlier priority date, then
02:16:50 16 there's intervening developed systems that invalidate their
02:16:53 17 patent. That's the anticipation defense.

02:16:56 18 THE COURT: My understanding was that if the
02:16:58 19 Plaintiffs are not entitled to the earlier 2006 priority
02:17:03 20 date, then there is elected prior art that might or might
02:17:06 21 not invalidate. But -- but I've never specified what that
02:17:13 22 prior art would be. It just opens the door to an
02:17:16 23 invalidity case based on anticipation or obviousness if we
02:17:20 24 don't have that earlier 2006 priority date.

02:17:25 25 But you all indicated to me for the first time at

02:17:27 1 the bench here yesterday afternoon that if the earlier
02:17:31 2 priority date did apply and the jury found that to be the
02:17:34 3 applicable priority date, then there was no anticipation or
02:17:36 4 obviousness defense.

02:17:38 5 MR. SHEASBY: That's correct.

02:17:39 6 MR. MELSHEIMER: Your Honor, it's in our --

02:17:40 7 THE COURT: It's always been conditional.

02:17:44 8 MR. MELSHEIMER: That's true. That's true.

02:17:45 9 MR. ROWLES: Your Honor, their only asserted prior
02:17:49 10 art is the earlier application -- very same patent --

02:17:51 11 THE COURT: All right. It is either is or it
02:17:51 12 isn't elected prior art.

02:17:51 13 MR. MELSHEIMER: It's disclosed in our 35 U.S.C.
02:17:58 14 282 disclosures, Your Honor.

02:17:58 15 MR. SHEASBY: I've never seen it.

02:18:00 16 THE COURT: Do I need to send the jury out and
02:18:02 17 let's get to the bottom of this because I'm hearing black
02:18:05 18 and white.

02:18:06 19 MR. MELSHEIMER: I'm happy to do that, Your Honor.

02:18:08 20 MR. SHEASBY: Here's the issue, Your Honor, that I
02:18:09 21 have, which is that they only -- the pleadings are merged
02:18:14 22 and --

02:18:14 23 THE COURT: And, Mr. Sheasby, I'm not going to let
02:18:16 24 Mr. Bittner argue for Mr. Melsheimer, and I'm not going to
02:18:19 25 let you argue for Mr. Rowles. I have to hold a firm line

02:18:24 1 here, or I'll have 15 people up here talking at the same
02:18:27 2 time.

02:18:27 3 (Whispering.)

02:18:27 4 MR. ROWLES: That's absolutely correct, Your
02:18:38 5 Honor. The only invalidity theory identified by
02:18:42 6 Mr. Saffici with respect to the two patents at issue in
02:18:44 7 this case is their predecessor on which patent applications
02:18:48 8 which they contend anticipate or render obvious in view of
02:18:51 9 the priority date. This is not an issue of invalidity.

02:18:54 10 MR. MELSHEIMER: Can we -- maybe we -- maybe it's
02:18:55 11 appropriate to take a break and pull out the record on
02:18:58 12 this, Your Honor. I don't want to say anything that's
02:19:00 13 inaccurate, and I don't want to waste your time up here.

02:19:02 14 THE COURT: If we can't resolve whether the prior
02:19:06 15 art mentioned is properly elected prior art, then I'll send
02:19:09 16 the jury out, and we'll get to the bottom of it. But it
02:19:12 17 will be on the clock, and it will be y'all's time that
02:19:15 18 somebody's going to waste to do it.

02:19:16 19 MR. MELSHEIMER: And I'm -- I can -- I'm also --

02:19:17 20 THE COURT: We're going to get -- we're going to
02:19:18 21 get this gentleman off the bench --

02:19:21 22 MR. MELSHEIMER: I understand.

02:19:21 23 THE COURT: -- off the witness stand.

02:19:22 24 MR. MELSHEIMER: I've only got about three or four
02:19:24 25 more questions. It's whatever the Court's pleasure is.

02:19:26 1 MR. SHEASBY: I mean, here's the issue. He can
02:19:28 2 ask the question. He can give an answer. We'll -- if --
02:19:32 3 we're going to request a severe limiting instruction if he
02:19:35 4 wants to gamble that way. And I think that's what we can
02:19:38 5 do.

02:19:38 6 THE COURT: Well, there's -- you've raised an
02:19:41 7 objection, and that objection is before me, that it calls
02:19:46 8 for opinion based on unelected prior art.

02:19:50 9 And either you need to withdraw the question, you
02:19:54 10 need to withdraw the objection, or I need to determine
02:19:55 11 whether it is or isn't previously properly elected prior
02:19:58 12 art. It's got to be one of those three things.

02:20:00 13 MR. MELSHEIMER: Can I have a moment, Your Honor?
02:20:08 14 I'm not -- again, I want to answer accurately and
02:20:08 15 truthfully. I need to consult or I need to move on and
02:20:09 16 take a break and then we can consult. I just need to
02:20:12 17 understand -- I don't want to -- you've asked whether or
02:20:15 18 not we want to withdraw or move on. I just want --

02:20:18 19 THE COURT: Who do you need to consult with?

02:20:20 20 MR. MELSHEIMER: Mr. Bittner and -- and
02:20:22 21 Mr. McCullough.

02:20:27 22 THE COURT: Well, why don't you bring whoever else
02:20:29 23 you need up here, and you all stand over there and talk for
02:20:34 24 just a minute. I'm not going to send you back to your
02:20:37 25 benches and then bring you back up here -- back to your

02:20:39 1 tables and bring you back up here.

02:20:40 2 MR. MELSHEIMER: Okay. Thank you.

02:21:33 3 (Pause in proceedings.)

02:21:33 4 THE COURT: You've consulted. What's your
02:21:33 5 position?

02:21:34 6 MR. MELSHEIMER: Our position is, Your Honor, this
02:21:36 7 is both in our invalidity contentions and in our 282
02:21:39 8 disclosure that this theory was -- fair notice of it.

02:21:45 9 Now, there was -- look, this -- they dropped a
02:21:47 10 bunch of claims on Sunday. This thing has been kind of a
02:21:51 11 shifting target, but there was no requirement that we drop
02:21:54 12 certain theories as long as -- just like there was no
02:21:57 13 requirement they had no deadline by which to drop claims.
02:22:00 14 It's in our original contentions. It's incorporated by
02:22:03 15 reference in our 282 notice, and I think it's -- it's out
02:22:07 16 there.

02:22:07 17 THE COURT: All right. What's the Plaintiff's
02:22:08 18 posture on that?

02:22:09 19 MR. ROWLES: I can read for you their invalidity
02:22:11 20 expert's deposition testimony which occurred before any
02:22:14 21 narrowing of the case.

02:22:15 22 The question is: You don't identify any system,
02:22:19 23 any design anywhere in the world that anticipates or
02:22:21 24 renders obvious the '605 or '681 patents, correct?

02:22:25 25 Answer: That's correct.

02:22:26 1 This is not a live invalidity theory.

02:22:29 2 MR. MELSHEIMER: I agree, it's not in his report.

02:22:31 3 THE COURT: We should have a -- we should have a
02:22:33 4 firm, fixed list of elected prior art that relates to
02:22:38 5 whatever the Defendant's invalidity theories are. And this
02:22:42 6 is either -- what's been called for in the question that's
02:22:46 7 before the Court should either be on that list of elected
02:22:49 8 prior art or not on that list of elected prior art.

02:22:49 9 MR. MELSHEIMER: There was no --

02:22:52 10 THE COURT: It doesn't mean -- I'm not concerned
02:22:55 11 about did we talk about it, do we know about it, did we
02:22:57 12 take a deposition on it. We've got a fixed universe of
02:23:00 13 elect prior art somewhere, and it's either there, or it's
02:23:03 14 not.

02:23:03 15 MR. MELSHEIMER: There was no requirement in this
02:23:05 16 case, Your Honor, to elect references, just like there
02:23:07 17 wasn't a deadline for claims. So the original invalidity
02:23:10 18 contentions -- this is in their -- there's never been a --
02:23:14 19 this pre-trial order did not have that requirement, as I
02:23:18 20 understand it.

02:23:22 21 And I agree that Mr. Saffici -- we're not going to
02:23:24 22 ask Mr. Saffici about this because he said he didn't have
02:23:26 23 an opinion about it.

02:23:27 24 MR. SHEASBY: Your Honor, it's their burden. If
02:23:29 25 they're not going to ask Mr. Saffici about a defense,

02:23:31 1 that's their burden.

02:23:38 2 MR. ROWLES: This is just a sideshow. It's just
02:23:39 3 injecting something that's going to confuse the jury about
02:23:41 4 the issues to be decided in this case.

02:23:46 5 If Mr. Saffici gets up here and doesn't testify
02:23:49 6 about the invalidity theory that's actually disclosed and
02:23:52 7 gives this testimony and they're asserting that their own
02:23:55 8 product is somehow prior art, then there would be no
02:23:58 9 instruction. It would be a directed verdict. Their own
02:24:01 10 invalidity expert concedes that no system anywhere in the
02:24:04 11 world other than the patents he identifies --

02:24:07 12 MR. MELSHEIMER: They're not -- I don't -- I don't
02:24:08 13 have to use my expert to do that. I can adduce that
02:24:12 14 evidence any way I want to adduce it.

02:24:14 15 THE COURT: Is this within the scope of Mr. --
02:24:16 16 Dr. Conte's report?

02:24:17 17 MR. ROWLES: It's absolutely not.

02:24:18 18 MR. MELSHEIMER: It's not in the scope of his
02:24:20 19 report, but -- that's true, but that wasn't the objection.

02:24:26 20 THE COURT: Well --

02:24:27 21 MR. MELSHEIMER: We did a claim-by-claim. All I'm
02:24:29 22 simply asking him, Your Honor, is if --

02:24:32 23 THE COURT: One at a time. I don't know how to
02:24:34 24 make that any clearer.

02:24:35 25 MR. MELSHEIMER: Your Honor, I simply said that

02:24:37 1 he -- I just drew a logical conclusion for what he's
02:24:42 2 saying. I didn't say it was your opinion. I didn't say it
02:24:44 3 was in your report. I simply said, look, if all these
02:24:48 4 things are in the prior system and if they're not entitled
02:24:51 5 to that priority date, then I would anticipate. That's all
02:24:54 6 I asked him.

02:24:54 7 THE COURT: And that's -- that may well be the way
02:24:56 8 you got there, but expert witnesses are confined to the
02:24:59 9 scope of their report, both on direct and cross. And if
02:25:03 10 it's not within the scope of his report, it's not a proper
02:25:06 11 question to ask him. And on that basis, I'm going to
02:25:10 12 exclude it.

02:25:13 13 MR. ROWLES: We'd ask for --

02:25:15 14 THE COURT: I heard the echo.

02:25:18 15 MR. ROWLES: Because of the nature of the
02:25:19 16 question, we'd ask for an instruction.

02:25:21 17 MR. MELSHEIMER: Hold on to that.

02:25:23 18 So here's the thing. The testimony that the
02:25:26 19 elements of this earlier version are satisfied, okay, that
02:25:32 20 should not be struck. He put up a slide to that effect.

02:25:35 21 THE COURT: I'm not going to strike anything. He
02:25:39 22 hasn't answered the question. I'm not going to instruct
02:25:41 23 the jury. I'm going to sustain the exclusion of the
02:25:45 24 outstanding answer to the question because it calls for an
02:25:47 25 opinion beyond the scope of this expert's report.

02:25:47 1 MR. MELSHEIMER: Okay. Okay.

02:25:52 2 THE COURT: And we're going to move on.

02:25:52 3 MR. MELSHEIMER: Understood.

02:25:53 4 THE COURT: And that's my ruling.

02:25:54 5 MR. MELSHEIMER: Thank you, Your Honor.

02:25:54 6 (Bench conference concluded.)

02:26:00 7 THE COURT: All right. That objection is
02:26:01 8 sustained.

02:26:01 9 Ask your next question, counsel.

02:26:05 10 MR. MELSHEIMER: Thank you, Your Honor.

02:26:05 11 Q. (By Mr. Melsheimer) Just a few final questions, sir.

02:26:10 12 You're not being put forth as an expert on damages in this
02:26:14 13 case, right?

02:26:15 14 A. I am not.

02:26:17 15 Q. You're not an economist or have any background in that
02:26:20 16 field, right?

02:26:20 17 A. I do not.

02:26:21 18 Q. And I think you've said you're not an expert on
02:26:23 19 principles of patent law, right?

02:26:25 20 A. No.

02:26:26 21 Q. And I believe you told me this at the beginning that
02:26:30 22 you -- you did not submit or file a report on the

02:26:34 23 validity -- on the validity of these patent claims that

02:26:37 24 were asserted here; that was done by someone else. Right?

02:26:39 25 A. That's correct.

02:26:42 1 MR. MELSHEIMER: May I have one moment, Your
02:26:44 2 Honor?

02:26:44 3 THE COURT: Yes, you may.

02:26:52 4 Q. (By Mr. Melsheimer) Dr. Conte, thank you for your
02:26:54 5 courtesies.

02:26:55 6 MR. MELSHEIMER: I pass the witness, Your Honor.

02:26:56 7 THE COURT: All right. Redirect by the Plaintiff?

02:27:00 8 MR. ROWLES: Yes, Your Honor.

02:27:13 9 Ready to proceed, Your Honor.

02:27:16 10 THE COURT: You may proceed, counsel.

02:27:16 11 REDIRECT EXAMINATION

02:27:19 12 BY MR. ROWLES:

02:27:19 13 Q. Good afternoon, Professor Conte.

02:27:20 14 A. Good afternoon.

02:27:21 15 Q. You were asked some questions about infringement --
02:27:22 16 about your infringement theories just a moment ago; is that
02:27:25 17 right?

02:27:25 18 A. I recall, yes.

02:27:26 19 Q. Were you asked any questions about infringement of the
02:27:30 20 '605 patent?

02:27:30 21 A. I don't believe so.

02:27:31 22 Q. Counsel asked you some questions about your review of
02:27:37 23 source code; do you recall that?

02:27:37 24 A. Yes.

02:27:38 25 Q. Could you just explain for the jury the actual process

02:27:41 1 you went through, what you did to review the source code in
02:27:43 2 this case?

02:27:44 3 A. Oh, wow. So first, there was a set of programmers that
02:27:51 4 went out and they cataloged what everything was and what
02:27:55 5 the versions were. And then I spent approximately 40 hours
02:27:59 6 at the law offices of Winston & Strawn where I reviewed the
02:28:05 7 code, tried to figure out each of the functionality.

02:28:07 8 When there was an aspect that I didn't understand,
02:28:12 9 I would then go back to that catalog those programmers
02:28:15 10 prepared to find the other piece and go back and forth
02:28:18 11 until I understood everything that was going on. As I
02:28:21 12 indicated, there were some pieces missing. So, luckily,
02:28:26 13 they did not impact any of what I needed to make the -- the
02:28:30 14 infringement decision.

02:28:31 15 Q. And did you yourself sit in the chair in -- in the law
02:28:37 16 offices in Dallas, Texas, reviewing source code?

02:28:40 17 A. Yes, yes, I did.

02:28:41 18 Q. Do you have an estimate of how many hours you were
02:28:44 19 actually sitting there at the computer?

02:28:45 20 A. I think it was about 40 hours. It was -- it was a
02:28:48 21 week, at least.

02:28:49 22 Q. Do you know whether or not Dr. Villasenor actually sat
02:28:54 23 down at that office and reviewed the same source code?

02:28:57 24 A. I don't believe he did.

02:29:00 25 MR. ROWLES: Mr. Huynh, can I get Slide 95,

02:29:02 1 please, from Dr. Conte's demonstratives?

02:29:06 2 Q. (By Mr. Rowles) You recall being asked some questions
02:29:25 3 about Claim 30 of the '681 patent on your
02:29:28 4 cross-examination, Dr. Conte?

02:29:29 5 A. I do.

02:29:29 6 Q. And so I want to direct your attention to what's
02:29:32 7 labeled Element -- Element F here, which begins confirming
02:29:36 8 that the mobile check deposit can go forward. Do you see
02:29:40 9 that?

02:29:40 10 A. Yes, I do.

02:29:40 11 Q. Does the word "deciding" appear anywhere in Claim 30?

02:29:45 12 A. It does not.

02:29:46 13 Q. Could you explain what this step of confirming that the
02:29:51 14 mobile check deposit can go forward is?

02:29:55 15 A. Well, as I said earlier, confirming means confirming to
02:29:59 16 the user. It's like that receipt you get from the teller.

02:30:02 17 Q. And is that something that's done by the mobile device
02:30:05 18 in the Wells Fargo system?

02:30:05 19 A. Yes.

02:30:06 20 Q. Is there any dispute about that?

02:30:08 21 A. No.

02:30:12 22 MR. ROWLES: And if I could get Slide 210, please,
02:30:15 23 Mr. Huynh. 210.

02:30:23 24 Q. (By Mr. Rowles) While we're waiting for that,
02:30:39 25 Professor Conte, does the mobile device confirm -- do that

02:30:43 1 confirmation before or after optical character recognition
02:30:46 2 is performed in the Wells Fargo system?

02:30:48 3 A. It does it after optical character recognition is
02:30:55 4 performed.

02:30:56 5 Q. And what happens before -- what happens in the system
02:30:58 6 before that confirmation, in terms of validating the check?

02:31:02 7 A. Well, it both compares the amount written on the check
02:31:09 8 to the OCR results, that's that handwriting, and it also
02:31:17 9 looks at the MICR line.

02:31:20 10 Q. Does that involve optical character recognition?

02:31:22 11 A. Yes, it does.

02:31:23 12 Q. Do you recall being asked some questions about whether
02:31:30 13 optical character recognition or OCR had been done before
02:31:30 14 the USAA patents?

02:31:32 15 A. Yes.

02:31:33 16 Q. And are you familiar with, as an example, when you
02:31:38 17 have -- are you familiar with a PDF document on your
02:31:41 18 computer, PDF?

02:31:42 19 A. Yes.

02:31:42 20 Q. Have you ever encountered the situation where maybe
02:31:46 21 you've copied some text from a PDF document, you paste it
02:31:50 22 into somewhere else, and it comes up sort of jumbled? Are
02:31:55 23 you familiar with that?

02:31:55 24 A. Yes, that happens a lot, in fact, with patents, when I
02:31:58 25 OCR patents.

02:31:59 1 Q. So you might have something that's a 5 in the document
02:32:02 2 and you put it in your -- an email and it comes up as an S,
02:32:09 3 would that be an example of that?

02:32:09 4 A. Yes.

02:32:09 5 Q. Is that an example of a problem with an OCR process?

02:32:13 6 A. Yes.

02:32:16 7 Q. In the -- in the Wells Fargo mobile deposit system,
02:32:20 8 when does that OCR process happen? Is it while the
02:32:21 9 customer is holding the phone waiting for the confirmation?

02:32:24 10 A. It does happen while the customer is waiting for the
02:32:28 11 confirmation.

02:32:29 12 Q. Does it take a long time or is it a pretty quick
02:32:32 13 process from the customer's point of view?

02:32:32 14 A. It's a fairly rapid process.

02:32:34 15 Q. And -- and what might happen if the -- if you didn't do
02:32:37 16 that optical character recognition on the check?

02:32:40 17 A. Well, then, as I said, a user could write a check for
02:32:46 18 \$5.00 and submit on the form \$5,000.00, and it wouldn't be
02:32:51 19 detected.

02:32:53 20 Q. At the beginning of your cross-examination, do you
02:32:56 21 recall being asked some questions about what the patents or
02:32:59 22 what USAA invented?

02:33:01 23 A. Yes.

02:33:02 24 Q. And there was a reference to the iPhone as something
02:33:05 25 that Apple created or invented; do you remember that?

02:33:09 1 A. Yes.

02:33:10 2 Q. In other words, Apple created the iPhone; is that
02:33:14 3 right?

02:33:14 4 A. Apple created it. I wouldn't say invented it.

02:33:16 5 Q. Does the iPhone have a processor in it?

02:33:20 6 A. Yes, it does.

02:33:21 7 Q. Do you know who invented the processor?

02:33:25 8 A. The microprocessor? Carlos Fagan [sic], I believe is
02:33:32 9 the name of the guy.

02:33:33 10 Q. Was it Apple?

02:33:34 11 A. No.

02:33:39 12 MR. ROWLES: If I could get Slide 25, please?

02:33:42 13 A. Sorry, it's Frederico Faggin, my apologies.

02:33:54 14 Q. (By Mr. Rowles) Do you recall talking about this slide
02:33:59 15 on -- on both your direct examination and your
02:34:02 16 cross-examination?

02:34:03 17 A. I do.

02:34:04 18 Q. So could you just refresh the jury's memory about
02:34:08 19 what -- what is this passage of the patent talking about?

02:34:11 20 A. Well, it's talking about two things. Again, it's
02:34:14 21 saying that the -- the image capture device is coupled to
02:34:18 22 the general purpose computer. And, as I said, if I were to
02:34:20 23 take a hammer and bust this up or I can go to Ifixit.com
02:34:25 24 and they've busted it up, I'd find there's a motherboard
02:34:31 25 here and then there's a wire from the sensor to that

02:34:35 1 motherboard, so that's the communicatively coupled part.

02:34:38 2 Q. And is that a description of the system claimed in the
02:34:40 3 USAA patents?

02:34:41 4 A. Yes.

02:34:41 5 Q. Now, you were asked some questions about Figure 1,
02:34:44 6 which is referred back to here. Do you remember that?

02:34:46 7 A. Yes.

02:34:46 8 Q. Is this passage in the specification, is it only
02:34:50 9 describing Figure 1 in your understanding?

02:34:53 10 A. No, it's describing the invention.

02:34:56 11 Q. And so are there -- you were shown a picture of
02:35:02 12 Figure 1 that I think had an icon, sort of a stick figure
02:35:07 13 sitting at a desktop-type computer; do you recall that?

02:35:10 14 A. Yes.

02:35:10 15 Q. Is the invention limited to that type of computer?

02:35:13 16 A. No, not at all.

02:35:14 17 Q. And what is -- what did USAA invent in these patents?

02:35:17 18 A. They invented a way to use consumer devices, including
02:35:23 19 a general purpose computer and a camera, to -- to do mobile
02:35:27 20 check deposit without needing to buy that expensive scanner
02:35:32 21 that does that optical character recognition or any of
02:35:34 22 that.

02:35:34 23 Q. Do you remember being asked some questions about PDAs
02:35:40 24 and the Palm Treo?

02:35:41 25 A. Yes.

02:35:41 1 Q. Is -- is a PDA -- well, let me ask this: This passage
02:35:47 2 that is shown on the screen here, the -- the image capture
02:35:52 3 device communicatively coupled to the computer, does that
02:36:00 4 passage appear in both patents?

02:36:01 5 A. Yes, it does.

02:36:02 6 Q. And does it apply to the systems in both of the
02:36:06 7 patents?

02:36:06 8 A. Yes, it does.

02:36:07 9 Q. And would a PDA be an example of a computer
02:36:08 10 communicatively coupled to an image capture device?

02:36:09 11 A. PDA with a camera would be, yes.

02:36:12 12 Q. Was a Palm Treo -- did the Palm Treo device you talked
02:36:16 13 about, that type of device?

02:36:17 14 A. Yes.

02:36:26 15 MR. ROWLES: Mr. Huynh, can you pull up the '681
02:36:29 16 patent, please? And if -- could we take a look at
02:36:42 17 Column 4, starting at Line 4 -- I'm sorry, Column 3,
02:37:05 18 beginning at Line 45, I apologize.

02:37:12 19 Q. (By Mr. Rowles) Do you remember looking at this
02:37:17 20 passage, this sentence beginning "a particular advantage"?
02:37:21 21 Do you remember that, Dr. Conte?

02:37:23 22 A. Yes, I do.

02:37:24 23 Q. What -- what is this -- what is this sentence
02:37:28 24 describing?

02:37:28 25 A. It's describing that the invention can work with

02:37:34 1 consumer electronics that a customer actually owns or
02:37:38 2 easily can acquire, such as a general purpose computer, a
02:37:41 3 scanner, and a digital camera.

02:37:42 4 Q. And is this passage also in both of the patents?

02:37:49 5 A. Yes, it is.

02:37:49 6 Q. Was a PDA, like the Palm Treo, a type of electronic
02:37:57 7 that consumers actually owned or could easily acquire back
02:38:00 8 in 2006?

02:38:00 9 A. It was.

02:38:01 10 Q. In fact, I think -- did you say that you actually owned
02:38:05 11 one in that time period; is that right?

02:38:06 12 A. I was very proud of mine. I can't find it right now,
02:38:09 13 which made me sad.

02:38:13 14 Q. Is that something that someone skilled in the art
02:38:16 15 reading this would readily understand?

02:38:20 16 A. Yes.

02:38:20 17 Q. Is there anything about the specifications of these
02:38:24 18 patents and in your review that requires particular
02:38:30 19 components to be in one box versus several boxes?

02:38:33 20 A. No. The -- the size of the box doesn't matter.

02:38:39 21 Q. In terms of the operation of the inventions, the claims
02:38:42 22 that you analyzed, is there any difference in implementing
02:38:50 23 it in something like the Palm Treo versus something with a
02:38:55 24 more separate, connected by a wire camera?

02:38:57 25 A. No.

02:38:58 1 Q. Did you -- you mentioned you worked with Mr. Calman; is
02:39:02 2 that right?

02:39:02 3 A. Yes.

02:39:02 4 Q. And there was some reference to expert reports, in your
02:39:08 5 cross-examination. Just to clarify, you prepared a written
02:39:11 6 report in this case setting out your opinions; is that
02:39:14 7 right?

02:39:14 8 A. Yes, I did.

02:39:15 9 Q. And did we actually look at some -- some pieces of that
02:39:19 10 on your cross-examination?

02:39:20 11 A. Yes, some figures from that, yes.

02:39:21 12 Q. And is it your understanding that Mr. Calman also
02:39:24 13 provided an expert report in this case?

02:39:25 14 A. Yes.

02:39:27 15 Q. And did you two work together collaboratively on parts
02:39:30 16 of those expert reports?

02:39:32 17 A. Yes, we did. I worked with Mr. Calman, and then we
02:39:38 18 made a decision of which sections would go in whose report,
02:39:41 19 and then we cross-referenced the others and incorporated
02:39:45 20 them in the other's report by reference.

02:39:47 21 Q. And did you review, as you were working together,
02:39:53 22 Mr. Calman's opinions about what's described in the
02:39:55 23 specifications of these patents?

02:39:56 24 A. Yes.

02:39:57 25 Q. Do you agree with his opinions?

02:39:58 1 A. Yes, I do.

02:40:04 2 Q. Now, you -- you were asked some questions about the
02:40:09 3 patent prosecution process generally. Do you remember
02:40:12 4 that?

02:40:12 5 A. Yes.

02:40:13 6 Q. And I think you said you yourself have a number of
02:40:15 7 patents and are -- and are generally familiar with that
02:40:18 8 process as a result; is that fair?

02:40:21 9 A. Yes.

02:40:21 10 Q. As part of your analysis in this case, did you review
02:40:26 11 what's called the prosecution history of the '681 and the
02:40:31 12 '605 patents?

02:40:31 13 A. I did.

02:40:32 14 Q. And is the concept of a prosecution history something
02:40:38 15 you have some general familiarity with?

02:40:40 16 A. Yes.

02:40:40 17 Q. All right. So, for example, I think counsel asked you
02:40:44 18 whether when you filed for your own patents, you're careful
02:40:49 19 to provide a complete written description of what you may
02:40:52 20 want to claim in those inventions. Do you remember that?

02:40:56 21 A. Yes, I recall that.

02:40:58 22 Q. And if you don't do that, you might hear back from the
02:41:03 23 Patent Office saying your written description was
02:41:06 24 incomplete; is that your understanding?

02:41:08 25 A. Yes, that would be what would happen.

02:41:11 1 Q. And in your review of the prosecution history of the
02:41:15 2 patents in this case, did you find anything that informed
02:41:18 3 your views about the -- the written description of the
02:41:23 4 claimed inventions in the '605 and the '681 patents?

02:41:26 5 A. Yes, I did.

02:41:27 6 Q. What did you find?

02:41:30 7 A. Well, I found that there were some objections raised by
02:41:36 8 the patent examiner, and then when the patent applicants
02:41:41 9 pointed out that it was a continuation --

02:41:43 10 MR. MELSHEIMER: Excuse me, Your Honor. May we
02:41:45 11 approach briefly?

02:41:46 12 THE COURT: Approach the bench.

02:41:48 13 (Bench conference.)

02:41:57 14 MR. MELSHEIMER: You know, his report --
02:41:59 15 Your Honor, my objection is that it's outside the scope of
02:42:02 16 his report. It's 500 some-odd pages. I don't remember
02:42:07 17 these opinions being offered in the expert report.

02:42:10 18 MR. ROWLES: Your Honor, two points. One is his
02:42:12 19 review of the prosecution -- prosecution history is in the
02:42:15 20 expert report. But, second, this is directly responsive to
02:42:19 21 questions on cross-examination about his understanding of
02:42:22 22 the patent prosecution process and the importance of
02:42:25 23 providing an adequate written description when filing a --

02:42:28 24 THE COURT: Where is his review of the prosecution
02:42:31 25 history stated in his report?

02:42:33 1 MR. ROWLES: It's stated in the materials that he
02:42:35 2 considered an essential --

02:42:35 3 MR. MELSHEIMER: Your Honor, so he's already
02:42:38 4 revealed that he doesn't offer this opinion. He says he
02:42:41 5 reviewed it. He doesn't offer the opinion he's about to
02:42:42 6 offer.

02:42:42 7 You cannot, quote, argue it's in response to
02:42:45 8 something that I did if it's not in his report. You
02:42:48 9 wouldn't let me get into something a moment ago that wasn't
02:42:51 10 in his report. So there's no opening the door, as I
02:42:53 11 understand it.

02:42:54 12 THE COURT: Does his report offer the opinion that
02:42:57 13 you're about to call for?

02:42:58 14 MR. ROWLES: It does not.

02:42:59 15 THE COURT: Or does it just simply say he reviewed
02:43:02 16 the prosecution history?

02:43:03 17 MR. ROWLES: The question --

02:43:04 18 THE COURT: His testimony needs to be limited to
02:43:06 19 the scope of his report.

02:43:08 20 MR. SHEASBY: We'll withdraw the question.

02:43:10 21 MR. ROWLES: That's fine.

02:43:11 22 THE COURT: Let's move on.

02:43:12 23 (Bench conference concluded.)

02:43:21 24 THE COURT: You're withdrawing the last question,
02:43:24 25 counsel?

02:43:24 1 MR. ROWLES: That's correct, Your Honor.

02:43:25 2 THE COURT: Then ask your next question, please.

02:43:28 3 MR. ROWLES: Thank you, Your Honor.

02:43:29 4 Q. (By Mr. Rowles) Professor Conte, when -- you generally
02:43:35 5 understand that after that patent prosecution process, that
02:43:38 6 you may get issued a patent by the government?

02:43:40 7 A. Yes.

02:43:41 8 Q. And you yourself have 40 issued patents; is that right?

02:43:44 9 A. That's correct.

02:43:45 10 Q. And is it your understanding that because of that
02:43:48 11 process, just generally speaking, an issued U.S. patent is
02:43:53 12 presumed to be valid?

02:43:53 13 A. Yes.

02:43:57 14 MR. ROWLES: I pass the witness, Your Honor.

02:43:59 15 THE COURT: Do you have further cross-examination,
02:44:01 16 Mr. Melsheimer?

02:44:01 17 MR. MELSHEIMER: I just have one question, Your
02:44:03 18 Honor.

02:44:03 19 THE COURT: Go right ahead. But I can count to
02:44:05 20 one.

02:44:05 21 RECROSS-EXAMINATION

02:44:11 22 BY MR. MELSHEIMER:

02:44:11 23 Q. Dr. Conte, are you familiar with what the Track 1
02:44:23 24 designation means in the patent prosecution context with
02:44:29 25 respect to the speed at which a patent must be reviewed

02:44:33 1 under Track 1?

02:44:35 2 A. No, I'm not.

02:44:38 3 MR. MELSHEIMER: Thank you, Your Honor. No
02:44:39 4 further questions.

02:44:40 5 THE COURT: All right. Mr. Rowles, any further
02:44:42 6 direct?

02:44:42 7 MR. ROWLES: Nothing further, Your Honor.

02:44:44 8 THE COURT: You may step down, Dr. Conte.

02:44:46 9 THE WITNESS: Thank you.

02:44:46 10 THE COURT: And, ladies and gentlemen, we're going
02:44:48 11 to take a recess at this point. I appreciate your patience
02:44:50 12 while we got this witness off the witness stand. Please
02:44:53 13 leave your notebooks closed and in your chairs, follow all
02:44:55 14 my instructions, including not to discuss the case among
02:44:58 15 yourselves, and we'll be back shortly to continue.

02:45:01 16 The jury is excused for recess.

02:45:02 17 COURT SECURITY OFFICER: All rise.

02:45:04 18 (Jury out.)

02:45:31 19 THE COURT: Counsel, before we recess, do I
02:45:33 20 understand that Plaintiff has deposition witnesses to
02:45:35 21 present next?

02:45:36 22 MS. GLASSER: That's correct.

02:45:37 23 THE COURT: How many different deposition
02:45:38 24 witnesses do you have?

02:45:39 25 MS. GLASSER: We have a total of six, one of which

02:45:42 1 is in part through the live reading.

02:45:45 2 THE COURT: All right. So five of them are video
02:45:50 3 and one of them you're going to have someone read the
02:45:53 4 transcription?

02:45:53 5 MS. GLASSER: Well, one of the witnesses is both.
02:45:55 6 So there's actually going to be six video clips, and then a
02:45:59 7 very short reading from the podium.

02:46:01 8 THE COURT: All right. Do you know where in this
02:46:04 9 colloquy of six different witnesses by deposition the one
02:46:08 10 with actual reading is going to take place?

02:46:10 11 MS. GLASSER: We had planned to do it at the end,
02:46:12 12 thinking that would be easiest.

02:46:14 13 THE COURT: I just want to know where it comes
02:46:17 14 before it springs itself upon me.

02:46:20 15 All right. With that, we'll take a short recess
02:46:23 16 and then we'll continue.

02:46:23 17 MR. MELSHEIMER: I'm sorry, Your Honor, can I
02:46:24 18 raise one other thing before the recess?

02:46:26 19 THE COURT: Well, you have, so what is it?

02:46:28 20 MR. MELSHEIMER: Mr. Hecht is our first witness.
02:46:32 21 There are some pending objections to his slides and things.
02:46:36 22 I don't know if the Court's had time to -- we're happy to
02:46:39 23 hear the Court's rulings on that or further discuss them,
02:46:42 24 but I think we're going to get to Mr. Hecht before the end
02:46:44 25 of the day.

02:46:46 1 THE COURT: Well, we've got these depositions
02:46:48 2 which are approximately an hour in length, and then we've
02:46:51 3 got the damages expert for Plaintiff.

02:46:57 4 MR. BUNT: Yes, Your Honor.

02:46:58 5 THE COURT: Mr. Weinstein.

02:46:59 6 MR. BUNT: Yes, Your Honor.

02:47:00 7 THE COURT: Do we have any kind of an estimate on
02:47:02 8 time both direct and cross for the damages expert?

02:47:04 9 MR. BUNT: Probably 40 minutes, 40 to 45 minutes
02:47:08 10 on direct.

02:47:08 11 THE COURT: Who is going to cross him?

02:47:10 12 MR. HILL: Probably an hour, Your Honor, on
02:47:12 13 cross-examination.

02:47:13 14 THE COURT: Okay. Well, if we get to the point
02:47:20 15 where Plaintiff -- excuse me, where Defendant calls their
02:47:22 16 first witness, then before that person's called to the
02:47:25 17 stand, we'll address those outstanding issues.

02:47:27 18 In the meantime, we stand in recess.

02:47:30 19 COURT SECURITY OFFICER: All rise.

03:07:48 20 (Recess.)

03:07:49 21 (Jury out.)

03:07:50 22 COURT SECURITY OFFICER: All rise.

03:07:51 23 THE COURT: Be seated, please.

03:07:54 24 MR. SHEASBY: Your Honor, may I be heard briefly?

03:07:57 25 THE COURT: What is it, Mr. Sheasby?

03:07:58 1 MR. SHEASBY: Your Honor, there are two issues
03:08:01 2 that I wanted to address. One is that we've gotten to the
03:08:04 3 bottom of this issue of whether Wells Fargo Mobile Deposit
03:08:07 4 was disclosed as an invalidating prior art reference in the
03:08:13 5 invalidity contentions. We don't believe it was.

03:08:16 6 We'd ask the Court's permission to serve a very
03:08:18 7 short brief on this subject. And if we are, in fact,
03:08:21 8 correct, we believe there needs be some sort of consequence
03:08:24 9 for publishing this theory in front of the jury through the
03:08:27 10 question.

03:08:28 11 So with your permission, we'd like to serve
03:08:31 12 that -- serve a short brief clarifying this issue because
03:08:32 13 it sounds like something that may come up again in a couple
03:08:37 14 days. But I can tell you, it is not an asserted prior art
03:08:40 15 reference to the '605 and '681 patents. They may disagree,
03:08:43 16 but it's not.

03:08:44 17 THE COURT: And I assume the Defendant does
03:08:47 18 disagree?

03:08:47 19 MR. SHEASBY: They do disagree.

03:08:48 20 MR. BITTNER: We disagree.

03:08:50 21 THE COURT: Have you all discussed this option or
03:08:52 22 suggestion of --

03:08:52 23 MR. SHEASBY: Well, we --

03:08:52 24 THE COURT: -- doing a short brief?

03:08:53 25 MR. SHEASBY: Well, I think we'd either be doing

03:08:55 1 it now or doing a short brief.

03:08:57 2 MR. BITTNER: We -- I mean, it's a -- it's a
03:08:58 3 two-pager, max. It's in there. We can quote -- we can
03:09:01 4 quote Your Honor the language. It's really --

03:09:03 5 THE COURT: Let me have not more than two pages
03:09:05 6 from both of you before in the morning.

03:09:08 7 MR. SHEASBY: Thank you, Your Honor.

03:09:09 8 MR. BITTNER: All right.

03:09:09 9 MR. SHEASBY: The second issue is, Mr. Melsheimer
03:09:11 10 has again made reference to the speed of prosecution
03:09:15 11 history with a witness who he said could not talk about the
03:09:18 12 prosecution history. So, literally, we had a sidebar in
03:09:22 13 which Mr. Melsheimer objected to Mr. -- Professor Conte
03:09:25 14 discussing the prosecution history.

03:09:26 15 And then his last question was about Track 1 in
03:09:30 16 the prosecution history, discussing the timing of the
03:09:32 17 prosecution history. We found a Federal Circuit case that
03:09:36 18 makes clear that it is totally improper to suggest in any
03:09:41 19 way that the conduct by the PTO reflects negatively on the
03:09:44 20 patent.

03:09:46 21 And this is happening multiple times, and I
03:09:48 22 believe it's getting out of hand. And I would like
03:09:50 23 permission to file a short brief asking for a curative
03:09:53 24 instruction or some type of instruction to Wells Fargo --

03:09:57 25 THE COURT: Where was your objection at the time

03:09:59 1 Mr. Melsheimer asked the question of the witness?

03:10:00 2 MR. SHEASBY: Well, Your Honor, I didn't object
03:10:02 3 for a very particular reason. And that reason is I didn't
03:10:05 4 want to draw -- draw more attention to it. And I'm not
03:10:08 5 asking for it to be stricken, but I think it needs to stop.

03:10:11 6 THE COURT: Well, I'm not going to -- I'm not
03:10:14 7 going to give any kind of curative instruction. I am going
03:10:17 8 to hold the parties to my earlier directive not to
03:10:23 9 denigrate or unreasonably elevate the PTO in any way.
03:10:28 10 They're not to be praised as infallible, and they're not to
03:10:32 11 be attacked as being slipshod and unreliable.

03:10:37 12 MR. SHEASBY: Your Honor, there's a deeper issue
03:10:38 13 here, which is saying they only did it in 12 months, the
03:10:42 14 Federal Circuit has said you can't do things like that.
03:10:44 15 You can't -- the only implication of that is that it was
03:10:47 16 done in a slipshod manner. And I don't think it's proper
03:10:50 17 under Federal Circuit -- it could have taken them five
03:10:53 18 years. It could have taken them three months. You can't
03:10:56 19 comment on the conduct of a government officer based on how
03:10:59 20 the government officer conducts the process.

03:11:01 21 It's just -- it's not allowed under Federal
03:11:04 22 Circuit precedent. In fact, the Federal Circuit has
03:11:07 23 expressly said unless it rises to the level of inequitable
03:11:10 24 conduct, you're not allowed to tell the jury, well, the
03:11:14 25 examiner did X or the examiner didn't do Y in terms of

03:11:18 1 failing to follow procedure.

03:11:20 2 THE COURT: Mr. Sheasby, if you at the end of the
03:11:23 3 evidence feel this is still an issue, I'll entertain a
03:11:27 4 request to include something of your suggestion in the
03:11:29 5 final instructions to the jury. But I'm not going to take
03:11:32 6 it up prior to then.

03:11:34 7 MR. SHEASBY: I understand, Your Honor. Thank you
03:11:35 8 for your time.

03:11:35 9 THE COURT: All right. Are we prepared to move
03:11:37 10 forward with Plaintiff's witnesses by deposition?

03:11:40 11 MS. GLASSER: Yes, Your Honor.

03:11:41 12 THE COURT: All right. Let's bring in the jury,
03:11:42 13 please.

03:11:45 14 COURT SECURITY OFFICER: All rise.

03:11:46 15 (Jury in.)

03:12:10 16 THE COURT: Please be seated.

03:12:11 17 Plaintiff, call your next witness.

03:12:14 18 MS. GLASSER: Thank you, Your Honor.

03:12:19 19 The Plaintiff calls Mr. Armin Ajami, a corporate
03:12:24 20 representative for Wells Fargo Bank by video deposition.

03:12:28 21 THE COURT: Proceed with the witness by
03:12:30 22 deposition.

03:12:32 23 (Videoclip played.)

03:12:33 24 QUESTION: Sir, can you state your full name for
03:12:35 25 the record?

03:12:35 1 ANSWER: Sure. It's Armin Ajami.

03:12:39 2 QUESTION: Where are you employed, sir?

03:12:40 3 ANSWER: Wells Fargo.

03:12:40 4 QUESTION: When did you begin to work for Wells
03:12:43 5 Fargo?

03:12:43 6 ANSWER: 2004.

03:12:43 7 QUESTION: What is your current position at Wells
03:12:47 8 Fargo?

03:12:47 9 ANSWER: I'm a strategic planning manager.

03:12:50 10 QUESTION: You told your managers that your
03:12:54 11 competitor's embrace of mobile check deposit had made it,
03:13:02 12 quote, a table stake capability, correct?

03:13:04 13 ANSWER: Correct, yeah.

03:13:05 14 QUESTION: In fact, it was listed as the No. 1 --
03:13:09 15 its absence was listed as the No. 1 pain point in mobile
03:13:13 16 usage in your study, correct -- of December 2010?

03:13:20 17 ANSWER: Sorry. Let me take a look. Yes, on this
03:13:24 18 paper. Yes. Yes, it was listed as No. 1 at that time.

03:13:27 19 QUESTION: So you were telling your managers that
03:13:29 20 the absence of mobile check deposit was the No. 1 pain
03:13:33 21 point in mobile plan, correct?

03:13:35 22 ANSWER: We -- yes, we were reporting that.

03:13:37 23 QUESTION: Now, I want to talk about the benefits
03:13:46 24 that are associated with mobile check deposit capture.

03:13:52 25 One of the benefits that are associated with

03:13:55 1 mobile check deposit capture is, if you're successful at
03:13:58 2 capturing the check image, it's cheaper to deposit using
03:14:04 3 mobile check deposit for Wells Fargo than via an ATM or a
03:14:09 4 bank teller, fair?

03:14:11 5 ANSWER: Yes. We looked at all channels, and it
03:14:15 6 was cheaper. The marginal cost was cheaper for mobile
03:14:19 7 deposit.

03:14:19 8 QUESTION: You told your superiors that there was
03:14:22 9 a dramatic shift in check deposit behavior after mobile
03:14:28 10 deposit adoption, correct?

03:14:29 11 ANSWER: There was -- yes, there was a dramatic
03:14:32 12 shift in check deposit behavior by the people who adopted
03:14:35 13 the service.

03:14:36 14 QUESTION: And what you told your superiors is
03:14:40 15 that when folks decided to use mobile tech -- check
03:14:45 16 deposit, there was a dramatic decrease in ATM usage and
03:14:51 17 teller usage to deposit checks, correct?

03:14:53 18 ANSWER: Not -- I wouldn't phrase it the way you
03:14:57 19 just phrased it, right? What we told our teams was the
03:15:00 20 people who adopted mobile check deposit, those folks,
03:15:05 21 right, their behavior for using the ATM or the teller line,
03:15:10 22 right, the -- the amount -- the frequency for them to use
03:15:13 23 those other channels decrease.

03:15:16 24 QUESTION: You told your superiors that over a
03:15:19 25 very, very short period of time, there was a 15 percent

03:15:24 1 decrease in ATM usage and a 9 percent decrease in teller
03:15:29 2 usage among folks who used mobile check --

03:15:33 3 ANSWER: Who adopted it. Yeah, I believe those
03:15:35 4 numbers are correct.

03:15:36 5 QUESTION: And those -- behavior shifting
03:15:41 6 continued over time, correct? It didn't plateau there?

03:15:45 7 ANSWER: That's a good question. It plateaued at
03:15:53 8 some point. It didn't go to zero. I mean, what -- we did
03:15:55 9 see people continue to use all three channels -- again,
03:15:59 10 based on whatever was convenient for the customer. But the
03:16:03 11 folks who did adopt mobile deposit -- their incidence rate
03:16:03 12 and there were factors in ATM, the number of checks that
03:16:03 13 were deposited --

03:16:03 14 COURT REPORTER: I'm sorry. The folks who did
03:16:03 15 mobile deposit --

03:16:09 16 ANSWER: Yeah, the folks who adopted mobile
03:16:12 17 deposit, their usage of the ATM and teller line decreased
03:16:15 18 over time, and it did plateau at some point. I think
03:16:19 19 this -- you're referring to some study we did, but I think
03:16:22 20 if you look at it longer term, it didn't -- it didn't drop
03:16:25 21 to zero, right, their usage with ATM or teller. It stopped
03:16:30 22 at a certain percentage.

03:16:31 23 QUESTION: Let's mark as the next exhibit in
03:16:37 24 order, Exhibit 9, which is mobile remote deposit capture
03:16:41 25 CBD stakeholder update which is from May 2011. Do you

03:16:47 1 recognize Exhibit 9?

03:16:47 2 ANSWER: I do.

03:16:48 3 QUESTION: What is Exhibit 9?

03:16:50 4 ANSWER: It's an internal presentation. CBD

03:16:53 5 stands for consumer business deposits group. So we're

03:16:57 6 giving our deposits group an update on the mobile deposit

03:17:04 7 capture project. This is May 2011. This is about a year

03:17:07 8 before we actually launched a product.

03:17:12 9 So this is a -- a version of our point of view

03:17:15 10 deck that we evolved over time. A point of view deck which

03:17:22 11 we evolved -- evolved over time. Sorry.

03:17:28 12 QUESTION: And I want to turn to page -- and you

03:17:34 13 endeavored to make this document accurate, correct?

03:17:36 14 ANSWER: Yes.

03:17:37 15 QUESTION: It was a document that you gave to

03:17:39 16 executives, correct?

03:17:40 17 ANSWER: It was.

03:17:43 18 QUESTION: When Wells Fargo was making the

03:17:45 19 decision -- the business decision to launch mobile deposit,

03:17:49 20 it concluded that a successful mobile check deposit capture

03:17:55 21 would be 20 cents, and that an ATM would be more than

03:18:00 22 double the cost, and that a teller would be more than 10

03:18:03 23 times the cost. That was the basis under which it was

03:18:06 24 making the decision, fair?

03:18:10 25 ANSWER: At this time -- we're talking May 2011 --

03:18:13 1 that's what we were talking about. It may have been
03:18:15 2 updated before a final decision was made, because we didn't
03:18:19 3 launch a product until May 2012, one year later. So this
03:18:24 4 may have evolved.

03:18:25 5 So when the final decision was made, there may
03:18:28 6 have been a different number. I don't know. But at this
03:18:31 7 time, in May 2011, this is the number we were working with.
03:18:34 8 This is the assumption.

03:18:35 9 QUESTION: You were the product manager for this
03:18:38 10 project through 2015, correct?

03:18:41 11 ANSWER: I was the senior product manager for
03:18:45 12 service. I had product managers who were running the
03:18:48 13 projects themselves.

03:18:49 14 QUESTION: Do you have any better information
03:18:51 15 between when this document, Exhibit 9, was given to your
03:18:58 16 executives in May 2011 and when the decision was made to
03:19:05 17 launch --

03:19:06 18 ANSWER: Okay.

03:19:06 19 QUESTION: -- mobile check deposit --

03:19:11 20 ANSWER: May 2012.

03:19:12 21 QUESTION: -- other than what's on Page 5?

03:19:14 22 ANSWER: I haven't seen anything else.

03:19:15 23 QUESTION: Turning back to Exhibit 3, which is the
03:19:19 24 presentation you proposed on expanding who could use the
03:19:25 25 system. In this document, you're reporting to executives

03:19:30 1 that the amount of fraud you were seeing was very low in
03:19:35 2 mobile check deposit, correct?

03:19:38 3 ANSWER: Which slide are you referring to? Sorry.

03:19:41 4 QUESTION: Slide 2.

03:19:43 5 ANSWER: Slide 2. Yeah, we -- we -- we called it
03:19:57 6 manageable fraud, right? So there was fraud, but it was
03:20:00 7 manageable.

03:20:01 8 QUESTION: Well, to be clear, this is reporting
03:20:03 9 that the amount of fraud in the mobile check deposit space
03:20:06 10 was less than the amount of fraud in the ATM space,
03:20:09 11 correct?

03:20:09 12 ANSWER: Where are you referring to? Sorry.

03:20:17 13 QUESTION: Sir, I'm looking at the 2013
03:20:19 14 presentation that you gave to your bosses. I'm looking at
03:20:23 15 Page 2 of that presentation. And this reports that the
03:20:26 16 amount of fraud that you were seeing was less in mobile
03:20:30 17 check deposit than with ATM, correct?

03:20:34 18 ANSWER: Sorry. You're looking at the second
03:20:37 19 bullet? No, I don't think it says that. Sorry. Can you
03:20:48 20 refer to where -- where -- where do you get that?

03:20:51 21 QUESTION: Percent of returned items leading to
03:20:54 22 loss, in mobile it's 2.6 versus ATM, it's 2.8.

03:20:58 23 ANSWER: Uh-huh.

03:20:58 24 QUESTION: Percent of deposits that were outsourced
03:21:02 25 for additional risk review, it's 0.5 percent for mobile

03:21:06 1 versus 1.52 percent for ATMs.

03:21:09 2 ANSWER: Uh-huh. Well, the percentages, right,
03:21:12 3 the amount of fraud, the dollar amount definitely is a lot
03:21:16 4 more than the ATM channels because of volume. We're
03:21:18 5 talking percentages, right, of returned items that led to a
03:21:22 6 loss? For mobile, it was -- yeah, 2.6 versus ATM, 2.8.

03:21:27 7 QUESTION: And in the data that you presented to
03:21:29 8 your bosses on Page 2, it showed that the -- in 2013, the
03:21:36 9 risk of fraud in the mobile deposit space was less than the
03:21:40 10 ATM deposit space, yes or no?

03:21:43 11 ANSWER: We said it was in line with ATM, and it
03:21:46 12 was a little bit lower, yeah.

03:21:48 13 QUESTION: And this is the data that Wells Fargo
03:21:49 14 had in 2013, correct?

03:21:51 15 ANSWER: In the first quarter of 2013.

03:21:54 16 (Videoclip ends.)

03:21:58 17 THE COURT: Does that complete this witness by
03:22:00 18 deposition?

03:22:00 19 MS. GLASSER: It does, Your Honor.

03:22:01 20 THE COURT: Plaintiff, call your next witness.

03:22:04 21 MS. GLASSER: USAA calls Mr. Arun Darpally of
03:22:12 22 Wells Fargo Bank, a corporate representative of Wells
03:22:13 23 Fargo.

03:22:14 24 THE COURT: Proceed with this witness by
03:22:16 25 deposition.

03:22:16 1 (Videoclip played.)

03:22:17 2 QUESTION: Good morning, sir. Can you state your
03:22:21 3 full name for the record, please?

03:22:22 4 ANSWER: My name is Arun Darpally.

03:22:25 5 QUESTION: Are you an employee of Wells Fargo?

03:22:30 6 ANSWER: Yes, I am.

03:22:31 7 QUESTION: When did you begin to be employed by
03:22:34 8 Wells Fargo?

03:22:34 9 ANSWER: Almost 10 years back.

03:22:37 10 QUESTION: What is your position at Wells Fargo?

03:22:40 11 ANSWER: I'm the lead developer for Wells Fargo.

03:22:42 12 QUESTION: The lead developer for what at Wells
03:22:47 13 Fargo?

03:22:47 14 ANSWER: Lead developer for the server side of the
03:22:51 15 mobile check deposit.

03:22:52 16 QUESTION: Sir, when did you begin to be involved
03:22:56 17 in mobile remote deposit capture at Wells Fargo?

03:23:00 18 ANSWER: I -- when I started looking into this
03:23:02 19 application, I started looking at the defects and then
03:23:04 20 started looking at the new requirements and then started to
03:23:07 21 lead the team.

03:23:09 22 QUESTION: Yes, sir. When did that occur?

03:23:11 23 ANSWER: 18 months back.

03:23:13 24 QUESTION: So you began to be involved in MRDC
03:23:19 25 approximately 18 months back?

03:23:21 1 ANSWER: That is right.

03:23:21 2 QUESTION: You've been designated to speak on
03:23:23 3 behalf of the company as to certain topics today, correct?

03:23:27 4 ANSWER: From the server side, yes.

03:23:28 5 QUESTION: What topics are those?

03:23:29 6 ANSWER: For the server side, those are the
03:23:39 7 cropping of the images and then the overall functionality
03:23:42 8 of the server side of the MRDC application.

03:23:45 9 QUESTION: So what are the basis -- when you said
03:23:48 10 you reviewed the patents, what patents did you review?

03:23:52 11 ANSWER: What patents?

03:23:54 12 QUESTION: Yes.

03:23:56 13 ANSWER: It was patents related to the check
03:23:59 14 deposit -- mobile check deposit.

03:24:01 15 QUESTION: Was it USAA patents or Wells Fargo
03:24:03 16 patents?

03:24:03 17 ANSWER: USAA patents.

03:24:04 18 QUESTION: Why did you review those patents?

03:24:10 19 ANSWER: So those patents were related to the
03:24:14 20 application I do and what is this about, so that's the
03:24:17 21 reason I looked into those patents.

03:24:19 22 QUESTION: You felt that the USAA patents related
03:24:22 23 to the things that you do. Is that what you just said?

03:24:24 24 ANSWER: Can you repeat that, please?

03:24:27 25 QUESTION: Yes. You just said you felt the USAA

03:24:30 1 patents relate to things that you do at Wells Fargo.

03:24:32 2 ANSWER: No, this is -- so this is related to the
03:24:41 3 mobile check deposit.

03:24:41 4 QUESTION: Yes, but can you just answer my
03:24:43 5 question yes or no?

03:24:43 6 ANSWER: No.

03:24:43 7 QUESTION: So you did not just testify that the
03:24:49 8 patents at USAA relate to things that you do at Wells
03:24:53 9 Fargo?

03:24:53 10 ANSWER: Yes.

03:24:54 11 QUESTION: How long did you spend reviewing the
03:24:57 12 patents?

03:24:58 13 ANSWER: For last one week.

03:25:02 14 QUESTION: Did you form opinions as to whether
03:25:05 15 Wells Fargo uses or does not use the USAA patents?

03:25:09 16 ANSWER: I don't have much knowledge about the
03:25:11 17 patents, so hence I don't have any -- any opinion.

03:25:14 18 QUESTION: How does the server side operation of
03:25:19 19 MRDC work?

03:25:24 20 So let me set the table. I understand that after
03:25:28 21 authentication, after checking for errors, after the images
03:25:41 22 have been previewed by the customer, check images are then
03:25:48 23 submitted to the Wells Fargo server for deposit. What
03:25:57 24 happens after that?

03:25:57 25 ANSWER: So once the checks images are submitted

03:25:58 1 to the server side, we send these images to a software,
03:26:04 2 Mitek software. We receive parts of the information back
03:26:08 3 from the Mitek, and then we send to another application
03:26:12 4 inside the Wells Fargo to deposit these checks.

03:26:14 5 QUESTION: So you're not aware of anything that
03:26:17 6 happens before the check images are received by the Wells
03:26:24 7 Fargo server?

03:26:24 8 ANSWER: That is correct.

03:26:24 9 QUESTION: What -- what does this Mitek server
03:26:31 10 send back to you?

03:26:31 11 ANSWER: Mitek sends us back the check amount,
03:26:34 12 check account number, check routing number, and the
03:26:38 13 threshold of the check.

03:26:39 14 QUESTION: What do you mean by the threshold of
03:26:41 15 the check?

03:26:41 16 ANSWER: Threshold of the check means, like,
03:26:45 17 whether they are able to deposit the check properly with
03:26:50 18 what confidence level.

03:26:53 19 QUESTION: What do you do after receiving
03:27:02 20 information from Mitek?

03:27:03 21 ANSWER: We receive the information from the Mitek
03:27:06 22 whether the check was successful or not. If it is
03:27:10 23 successful, we send this information to another system
03:27:14 24 which is internal to Wells Fargo.

03:27:15 25 QUESTION: Do you provide any information back to

03:27:37 1 the user?

03:27:38 2 ANSWER: Once the other system in Wells Fargo
03:27:42 3 process it and provides success information, we provide the
03:27:47 4 confirmation number back to the user.

03:27:49 5 QUESTION: What additional operations are
03:27:52 6 performed by the Wells Fargo server -- server once it
03:27:57 7 receives the data from Mitek?

03:28:02 8 ANSWER: Once we receive the Mitek information, we
03:28:05 9 send that information back to the other system in Wells
03:28:11 10 Fargo.

03:28:11 11 QUESTION: What is that other system that you send
03:28:15 12 it to?

03:28:15 13 ANSWER: The application name is called TMS.

03:28:17 14 QUESTION: What does TMS send back to you?

03:28:20 15 ANSWER: It sends back with the successful or
03:28:23 16 unsuccessful.

03:28:24 17 QUESTION: And what do you do with that
03:28:33 18 information?

03:28:33 19 ANSWER: If it is successful -- if it is success,
03:28:36 20 we show the confirmation number back to the customer about
03:28:39 21 their check deposit is success. If it is a failure, we
03:28:42 22 show the failure to the user.

03:28:45 23 QUESTION: If it's a success, what happens next?

03:28:56 24 ANSWER: In our application, that will be the end
03:28:57 25 of the processing. We will not do anything after that.

03:29:00 1 QUESTION: Did you determine whether there's any
03:29:03 2 server at Wells Fargo that does anything to check whether
03:29:07 3 the check was previously deposited?

03:29:10 4 ANSWER: Yes, in our server side software, we do
03:29:13 5 the duplicate detection.

03:29:14 6 QUESTION: So how does the code that you're
03:29:18 7 responsible for do a duplicate detection?

03:29:20 8 ANSWER: So once we receive the information back
03:29:22 9 from Mitek, we look into our database to see the same MICR
03:29:31 10 line and the amount are already present in the database in
03:29:35 11 the last 90 days. If yes, we show the user the duplicate
03:29:40 12 message.

03:29:40 13 QUESTION: What information do you use to
03:29:42 14 determine whether the user is a safe user or user who is
03:29:47 15 associated with fraud?

03:29:48 16 ANSWER: We send the user information and the
03:29:51 17 amount of the check.

03:29:53 18 QUESTION: How do you identify the customer
03:29:55 19 associated with that check, sir?

03:29:57 20 ANSWER: That information we receive as part of
03:30:00 21 the login.

03:30:05 22 QUESTION: So as part of the login process for the
03:30:11 23 mobile remote deposit capture information, the
03:30:12 24 identification of the customer information is provided to
03:30:14 25 you?

03:30:14 1 ANSWER: That is correct.

03:30:27 2 QUESTION: You identified two fraud checks that
03:30:29 3 are performed before the images are submitted for deposit
03:30:31 4 at TMS. One relates to a duplicate check, and one relates
03:30:37 5 to whether the user is associated with fraud. Are there
03:30:41 6 any others?

03:30:42 7 ANSWER: I don't remember anything else.

03:30:48 8 QUESTION: Now, for the duplicate check, that
03:30:53 9 requires you to have extracted the MICR information from
03:30:57 10 the check, correct?

03:30:58 11 ANSWER: That information we receive from Mitek,
03:31:00 12 we send that information to the database to find out.

03:31:04 13 QUESTION: I understand that. My -- my point is,
03:31:08 14 is that you can't do the duplicate-based fraud check
03:31:11 15 without having the information on the MICR line and the
03:31:15 16 amount of the check, correct?

03:31:17 17 ANSWER: We receive that information from the
03:31:21 18 Mitek. Only once Mitek is successful, that information is
03:31:24 19 provided. Then only we will go for the duplicate check.

03:31:30 20 QUESTION: My point is, is that to do the
03:31:33 21 duplicate check, you are required to have the MICR line
03:31:35 22 information and the amount information for the check,
03:31:38 23 correct?

03:31:38 24 ANSWER: If the Mitek response is successful, we
03:31:45 25 receive that information from Mitek, and if this is

03:31:47 1 successful, only we go to the duplicate detection.

03:31:51 2 QUESTION: I understand that, sir. But what I'm
03:31:54 3 trying to ask -- ask is to do the duplicate detection, it's
03:31:59 4 required that you have the MICR line information and the
03:32:04 5 amount information for the check, correct?

03:32:07 6 ANSWER: For the duplicate detection, we use the
03:32:10 7 MICR line and the amount.

03:32:13 8 QUESTION: Is there any other way to do the
03:32:16 9 duplicate detection that would not involve the MICR line
03:32:21 10 and the amount?

03:32:23 11 ANSWER: Right now, there's nothing in the system
03:32:28 12 for the duplicate detection other than that.

03:32:29 13 QUESTION: Can you think of any other way to
03:32:32 14 perform duplicate detection that does not involve the MICR
03:32:36 15 line and the amount?

03:32:37 16 ANSWER: I can't think of anything right now.

03:32:42 17 QUESTION: Is it possible to perform the
03:32:45 18 authentication function that you do involving the customer
03:32:47 19 without having the customer identification information that
03:32:50 20 you receive from the mobile application?

03:32:53 21 ANSWER: I am not sure on that.

03:32:56 22 QUESTION: Sitting here today, can you think of
03:32:58 23 any other way to perform the customer authentication
03:33:03 24 process that you've been describing that does not require
03:33:06 25 the receipt of customer identification information via the

03:33:11 1 mobile app?

03:33:11 2 ANSWER: I can't think of anything right now.

03:33:14 3 QUESTION: Sir, as Wells's corporate witness, do
03:33:21 4 you know whether it's the portable device or the -- Wells's
03:33:28 5 server that submits a check for deposit after the user is
03:33:32 6 authenticated, after electronic images are presented to the
03:33:36 7 user, and after the portable device checks for errors?

03:33:41 8 ANSWER: I will not know about that.

03:33:43 9 (Videoclip ends.)

03:33:45 10 THE COURT: Does that complete this witness by
03:33:51 11 deposition?

03:33:52 12 MS. GLASSER: It does, Your Honor.

03:33:53 13 THE COURT: All right. Call your next witness,
03:33:55 14 please.

03:33:55 15 MS. GLASSER: USAA calls Mr. Jeffrey Easley by
03:34:01 16 video deposition. Mr. Easley is an associate vice
03:34:03 17 president and corporate representative of USAA.

03:34:06 18 THE COURT: Proceed with this witness by
03:34:08 19 deposition.

03:34:08 20 (Videoclip played.)

03:34:09 21 QUESTION: Will you please state your name for the
03:34:14 22 record?

03:34:14 23 ANSWER: Jeff Easley.

03:34:16 24 QUESTION: And who is your current employer,
03:34:19 25 Mr. Easley?

03:34:19 1 ANSWER: USAA.

03:34:20 2 QUESTION: And what is your current title at USAA?

03:34:22 3 ANSWER: Current title is assistant vice

03:34:25 4 president, governance risk compliance programs.

03:34:29 5 QUESTION: You understand that this deposition is

03:34:33 6 being taken both in your capacity as an individual and in

03:34:39 7 your capacity as a representative of the corporation, USAA?

03:34:42 8 ANSWER: I understand.

03:34:43 9 QUESTION: You understand that prior to this

03:34:47 10 deposition, my client, Wells Fargo, sent USAA a list of

03:34:53 11 topics that we wanted them to prepare a witness on.

03:34:58 12 ANSWER: Yes.

03:35:00 13 QUESTION: And when was Deposit@Home launched?

03:35:03 14 ANSWER: Deposit@Home was launched in late summer

03:35:07 15 of 2006, August, September time frame.

03:35:13 16 QUESTION: How many employees and members was

03:35:18 17 Deposit@Home offered to initially, in the phased launch?

03:35:23 18 ANSWER: I don't recall the exact details.

03:35:25 19 QUESTION: Hundreds? Thousands?

03:35:27 20 ANSWER: My guess would be hundreds.

03:35:32 21 QUESTION: When was the full launch of

03:35:36 22 Deposit@Home to all eligible members?

03:35:42 23 ANSWER: I would put that at January 2007.

03:35:46 24 QUESTION: When it was launched in January 2007 to

03:35:48 25 all eligible members, it was a product to allow those

03:35:52 1 members to use a flatbed scanner and their home computer to
03:35:59 2 effect a check deposit?

03:36:00 3 ANSWER: The first application was using their
03:36:07 4 computer to capture an image to effect a deposit. In terms
03:36:16 5 of the --

03:36:17 6 QUESTION: Let me -- go ahead.

03:36:19 7 ANSWER: In terms of what was communicated to the
03:36:21 8 numbers, and I separate that from what we technically could
03:36:24 9 do in terms of the product presented, that was the first
03:36:29 10 use case communicated.

03:36:31 11 QUESTION: And when you say members were using a
03:36:33 12 computer, you mean members using a computer connected to a
03:36:37 13 flatbed scanner, correct?

03:36:38 14 ANSWER: Correct.

03:36:38 15 QUESTION: And that's how it was launched in
03:36:41 16 January -- January 2007?

03:36:42 17 ANSWER: Correct.

03:36:42 18 QUESTION: And that's how it was launched during
03:36:44 19 the phase launch in August or September of 2006?

03:36:47 20 ANSWER: Correct.

03:36:48 21 QUESTION: Internally, sometime in October of
03:36:53 22 2006, a digital camera was used in place of a scanner,
03:36:56 23 correct?

03:36:56 24 ANSWER: Correct.

03:36:56 25 QUESTION: But that would have been kind of a

03:37:04 1 normal Canon or Nokia digital camera with button on top
03:37:11 2 that you press that would then -- you'd use a cable to
03:37:15 3 connect that to your computer to get the image out of the
03:37:17 4 camera and on your computer, correct?

03:37:19 5 ANSWER: Technically, yes. Anything that could
03:37:25 6 use a TWAIN driver connected to your PC -- TWAIN,
03:37:31 7 T-W-A-I-N, I think it's a technical protocol.

03:37:34 8 The distinction I made earlier was our
03:37:40 9 communication was, you know, use your scanner to put the
03:37:45 10 check on the glass.

03:37:46 11 The technical ability, and I believe the initial
03:37:51 12 launch was, as long as you had a device connected to your
03:37:54 13 PC that could take an image of a check, that could be
03:38:00 14 brought into our process for deposit.

03:38:02 15 QUESTION: And just so we're clear, when you say
03:38:06 16 connected to, you mean via a physical cable, correct?

03:38:09 17 ANSWER: Yes. What I -- what I don't have details
03:38:15 18 of is, you know, was there wireless connectivity at that
03:38:18 19 time. I'm not sure. But --

03:38:20 20 QUESTION: But at the very least, we're talking
03:38:23 21 about two separate devices here. We're talking about
03:38:25 22 computers, and we're talking about some sort of camera or
03:38:28 23 scanner. And those would talk to each other via what you
03:38:31 24 called a TWAIN driver?

03:38:32 25 ANSWER: Correct.

03:38:32 1 QUESTION: Okay. But they were separate devices
03:38:34 2 in --

03:38:35 3 ANSWER: Correct.

03:38:35 4 QUESTION: -- between August -- August 2006 to
03:38:38 5 January 2007, correct?

03:38:40 6 ANSWER: Correct.

03:38:40 7 QUESTION: USAA did not begin experimentation
03:38:50 8 using a single integrated device, like a mobile phone with
03:38:54 9 a camera built in, until -- your notes state April 2007,
03:39:03 10 correct?

03:39:03 11 ANSWER: Formally, correct. What we had realized
03:39:06 12 was thanks to our members, this -- our technology could --
03:39:12 13 you know, at that time, could conceivably support any range
03:39:15 14 of digital image --

03:39:22 15 QUESTION: In preparing for today's deposition,
03:39:24 16 did you find out when the very first test on a mobile phone
03:39:28 17 occurred?

03:39:28 18 ANSWER: I found out as part of that formal
03:39:30 19 research effort that I believe that formally occurred
03:39:35 20 December 2007, or at least the briefing of the activity
03:39:43 21 occurred in December of 2007. I don't recall the specific
03:39:47 22 date and time of the actual transaction.

03:39:52 23 QUESTION: So a research effort was launched -- so
03:39:57 24 you were approved for a total of \$900,000.00?

03:40:03 25 ANSWER: Correct.

03:40:03 1 QUESTION: You anticipated you would spend closer
03:40:06 2 to \$1,094,000.00?

03:40:11 3 ANSWER: Correct.

03:40:11 4 QUESTION: And do you have any recollection as to
03:40:14 5 what the actual cost of the Deposit@Home research was?

03:40:17 6 ANSWER: I do not.

03:40:18 7 QUESTION: Do you have any reason to dispute that
03:40:23 8 it was -- is it fair to say that somewhere in the 2007/2008
03:40:27 9 time frame, there was a widespread industry recognition
03:40:33 10 that mobile banking would be a burgeoning trend?

03:40:44 11 ANSWER: I don't think that would be fair to say.
03:40:55 12 My view is there were phones with digital cameras, and
03:41:00 13 maybe it's just because I'm an Apple fan, but I do believe
03:41:03 14 the success of the iPhone -- like I said, it's the same
03:41:09 15 time period. I apologize.

03:41:10 16 Yeah, I think with the advent of that iPhone and
03:41:14 17 the ability for apps to be created opened the door to
03:41:20 18 mobile banking. And I would say it's fair to say that's
03:41:23 19 when a lot of the conversations began.

03:41:28 20 QUESTION: And is it fair to say those
03:41:30 21 conversations weren't limited to USAA? The entire banking
03:41:32 22 industry was talking about mobile banking in the 2008 time
03:41:35 23 frame, following the iPhone launch?

03:41:36 24 ANSWER: I would imagine banks that sought to be
03:41:39 25 competitive were talking about it.

03:41:41 1 QUESTION: You would have expected your
03:41:45 2 competitors to be looking into mobile banking solutions
03:41:48 3 following the launch of the first iPhones?

03:41:49 4 ANSWER: I would. And -- from my experience with
03:42:05 5 the mobile deposit or even before the -- the RDC products,
03:42:10 6 my recollection of that time period was that mobile banking
03:42:16 7 was more of a way just to have your web banking on your
03:42:19 8 phone.

03:42:21 9 So what I recall from that time is mainly checking
03:42:25 10 your balance, funds transfers, transactions, web bill pay.

03:42:33 11 I still think at that time, we were recognized as
03:42:38 12 being very innovative and early with the ability to deposit
03:42:43 13 a check through a mobile device.

03:42:46 14 QUESTION: Do you know what the total investment
03:42:50 15 cost to USAA was for the Deposit@Mobile product?

03:42:54 16 ANSWER: I do not have that broken out just for
03:42:57 17 Deposit@Mobile.

03:42:59 18 QUESTION: And you also do not know what the total
03:43:03 19 investment in Deposit@Mobile prior to November 2009 would
03:43:07 20 have been?

03:43:08 21 ANSWER: Not specifically, no.

03:43:12 22 QUESTION: Who would you talk to to find that out?
03:43:20 23 Would you turn your attention to Exhibit 3 again, the list
03:43:23 24 of 30(b)(6) topics?

03:43:29 25 ANSWER: Yes.

03:43:30 1 QUESTION: Topic 29, all analyses, studies,
03:43:36 2 materials, relating to any capital development requests,
03:43:40 3 authorizations, and approvals related to covered
03:43:44 4 technology, including but not limited to Deposit@Home and
03:43:46 5 Deposit@Mobile?

03:43:47 6 ANSWER: Correct.

03:43:47 7 QUESTION: Are you prepared to testify about this
03:43:49 8 topic today?

03:43:50 9 ANSWER: I am.

03:43:50 10 QUESTION: But you are not aware, sitting here
03:43:59 11 today, of the capital development costs prior to October
03:44:05 12 2006 for Deposit@Home?

03:44:09 13 ANSWER: As of today, I do not have that specific
03:44:15 14 breakout of costs.

03:44:17 15 QUESTION: And you were also not aware of the
03:44:20 16 capital development costs prior to November 2009 for
03:44:24 17 Deposit@Mobile?

03:44:25 18 ANSWER: Not as of today, not readily available.

03:44:29 19 QUESTION: Okay. But have you prepared -- have
03:44:31 20 you come up with some sort of estimate of the expenses that
03:44:34 21 USAA put into the mobile deposit and home deposit?

03:44:39 22 ANSWER: I have, yes.

03:44:39 23 QUESTION: And can you explain to me how you came
03:44:42 24 up with that estimate?

03:44:43 25 ANSWER: So my estimate for developing remote

03:44:52 1 deposit capture products is the activities that represented
03:44:57 2 major developments from 2004 through 2013. An estimate of
03:45:03 3 the number of core engineers -- we estimated 30 core
03:45:08 4 engineers involved in that period, as well as a number of
03:45:12 5 other employees in a number of different departments that
03:45:21 6 also supported the development from cash operations to
03:45:28 7 finance to HR training, product management, project
03:45:32 8 management.

03:45:33 9 I have a list of around 15 or so departments that
03:45:39 10 also participated in the development over those years. And
03:45:43 11 my estimation of that total activity for that 10-year
03:45:47 12 period is -- is somewhere north of \$100 million in costs.

03:45:52 13 QUESTION: Are you familiar with the economic
03:45:54 14 benefits that USAA associates with remote deposit capture?

03:46:00 15 ANSWER: Yes, I am familiar.

03:46:02 16 QUESTION: Can you tell us generally what those
03:46:04 17 benefits are?

03:46:05 18 ANSWER: We see five economic benefits. No. 1,
03:46:13 19 cost savings on check processing, from channels like check
03:46:23 20 by mail costing \$1.21 per deposit, to remote deposit
03:46:28 21 capture deposit costing 4 cents per deposit.

03:46:34 22 No. 2, we see capital investment savings in
03:46:40 23 avoiding the building and maintaining of branches to
03:46:44 24 attract and collect more deposits, as is traditional
03:46:50 25 banking model. That's a significant amount of capital to

03:46:54 1 build and maintain those.

03:46:56 2 QUESTION: How does remote deposit capture,
03:46:58 3 whether it's by using mobile deposit or at home deposit,
03:47:03 4 how does that allow the bank not to have additional branch
03:47:11 5 offices?

03:47:11 6 ANSWER: So the traditional banking model up and
03:47:16 7 to that point, still here today, but certainly remote
03:47:21 8 deposit capture is an innovation that -- that addresses
03:47:28 9 this.

03:47:29 10 The traditional model is to open branches in
03:47:35 11 geographical areas, given customers bank with someone who
03:47:42 12 is in their neighborhood or who has a physical presence,
03:47:46 13 and the branch, especially in those times, was the way in
03:47:50 14 which banks attracted new customers and the deposits that
03:47:53 15 they brought with them.

03:47:54 16 With remote deposit capture, that untethered the
03:48:04 17 ability to deposit a check from having to go to a branch to
03:48:09 18 do it.

03:48:10 19 QUESTION: What other economic benefits does USAA
03:48:14 20 associate with remote deposit capture?

03:48:15 21 ANSWER: Another economic benefit is the ecosystem
03:48:23 22 in which a member who has a checking account with us is
03:48:29 23 likely to be introduced to other products that USAA offers.

03:48:36 24 So the checking relationship, as we refer to it,
03:48:41 25 means a member experiences USAA, and a service like remote

03:48:49 1 deposit capture is a very valuable service in terms of
03:48:52 2 convenience and time savings for members.

03:48:54 3 So that, as we say internally, delightful
03:48:59 4 experience leads to an interest in other ways that USAA can
03:49:03 5 provide financial services to them.

03:49:04 6 So there is a path in which, typically, follows
03:49:08 7 the acquisition of a checking account where a member is
03:49:13 8 likely to pick up a savings account, an auto loan, or an
03:49:20 9 auto insurance product or credit card product as part of
03:49:25 10 that relationship path.

03:49:25 11 Each of those products have their own financials
03:49:29 12 to them. So that's -- that's an economic benefit to USAA.

03:49:33 13 QUESTION: Are you familiar with any comparable
03:49:36 14 license agreements that we could look to to analyze the
03:49:39 15 ecosystem benefits that you discussed?

03:49:42 16 ANSWER: Yes, I would say a comparable licensing
03:49:47 17 agreement is our agreement with Zelle.

03:49:50 18 QUESTION: Can you tell us what Zelle is?

03:49:51 19 ANSWER: I can. Zelle is, from a members'
03:50:00 20 perspective, a service offered to allow you to send money
03:50:03 21 to another person. So that ecosystem benefit comparison is
03:50:14 22 as an access to money. So if you need to get money to a
03:50:19 23 friend, family member, in this case, or another account you
03:50:22 24 have at another bank, this agreement with Zelle is a
03:50:28 25 service provided that gives you that access as a banking

03:50:32 1 member.

03:50:32 2 QUESTION: And how does Zelle charge for its
03:50:35 3 services?

03:50:35 4 ANSWER: Zelle is a service provided by Early
03:50:46 5 Warning Systems, which is a company that is owned by
03:50:50 6 several founding banks. The founding banks -- well, let
03:50:56 7 me -- before I get to that. The charge to USAA to allow
03:51:01 8 you to send money to another -- to someone at another bank
03:51:07 9 is 60 cents per transaction. For us, we pay that fee to
03:51:17 10 Early Warning Systems.

03:51:18 11 The founding members of -- the founding banks of
03:51:22 12 that service receive ben -- economic benefit as a result of
03:51:27 13 us paying that fee.

03:51:28 14 So, for us, it's comparable in terms of the cost
03:51:35 15 that we -- we expend to allow our members the convenience
03:51:39 16 of sending money to -- to other people.

03:51:42 17 (Videoclip ends.)

03:51:46 18 THE COURT: Does that complete this witness by
03:51:49 19 deposition?

03:51:51 20 MS. GLASSER: There's actually a second volume to
03:51:54 21 him, but may we approach? The parties would like to
03:51:56 22 propose something.

03:51:57 23 THE COURT: Approach the bench.

03:51:58 24 (Bench conference.)

03:52:05 25 MS. GLASSER: The parties -- we would propose, and

03:52:08 1 they have no objection, to breaking the depo videos and
03:52:11 2 calling Mr. Weinstein just so we make sure we get him on
03:52:14 3 and off today. There's another over 30 minutes or so of
03:52:19 4 videos to go.

03:52:20 5 MR. MELSHEIMER: Let the record reflect
03:52:21 6 Mr. Sheasby told me that the jury is falling asleep. And I
03:52:24 7 agree to break things up because I'm so reasonable on
03:52:29 8 everything that I say, even though that was not the deal.
03:52:33 9 That's fine by me.

03:52:35 10 THE COURT: So at this point, you want to call
03:52:40 11 Weinstein?

03:52:41 12 MR. BUNT: Yes, Your Honor.

03:52:42 13 THE COURT: And you're going to do the direct?

03:52:44 14 MR. BUNT: Yes, Your Honor.

03:52:44 15 THE COURT: You're going to cross?

03:52:46 16 MR. HILL: Yes, sir.

03:52:46 17 THE COURT: Okay. That's fine with me.

03:52:48 18 MR. MELSHEIMER: Thank you.

03:52:51 19 THE COURT: I'll just call for the next witness.

03:52:54 20 (Bench conference concluded.)

03:52:58 21 THE COURT: All right. Having completed that last
03:53:00 22 witness by deposition, Plaintiff, call your next witness.

03:53:02 23 MR. BUNT: At this point, Your Honor -- sorry. At
03:53:05 24 this point, Your Honor, we're going to call Mr. Roy
03:53:08 25 Weinstein.

03:53:08 1 THE COURT: All right. Mr. Weinstein, if you'd
03:53:11 2 come forward and be sworn, please.

03:53:13 3 (Witness sworn.)

03:53:36 4 THE COURT: Please come around, sir. Have a seat
03:53:38 5 on the witness stand.

03:53:51 6 Mr. Bunt, you may proceed with direct examination
03:53:54 7 for the Plaintiff when ready.

03:53:56 8 MR. BUNT: Thank you, Your Honor.

03:53:56 9 ROY WEINSTEIN, PLAINTIFF'S WITNESS, SWORN

03:53:56 10 DIRECT EXAMINATION

03:53:57 11 BY MR. BUNT:

03:53:57 12 Q. Good afternoon, sir.

03:53:59 13 A. Good afternoon.

03:53:59 14 Q. Would you mind stating your name for the jury, please,
03:54:04 15 sir?

03:54:04 16 A. My name is Roy Weinstein.

03:54:05 17 Q. Can you tell the jury a little bit about yourself?

03:54:08 18 A. Sure. I live in Los Angeles, California. I'm an
03:54:10 19 economist and managing director at an economic research and
03:54:15 20 consulting firm called Micronomics. I'm married with two
03:54:21 21 grown children and one grandchild.

03:54:22 22 Q. And why are you here today, Mr. Weinstein?

03:54:24 23 A. I'm here to talk about fair compensation to be paid by
03:54:32 24 Wells Fargo to USAA for use of the patents-in-suit during
03:54:38 25 the damages period.

03:54:41 1 Q. Mr. Weinstein, we'll go over your analysis in detail in
03:54:45 2 a moment, but, first, can you provide the jury with your
03:54:48 3 conclusion as to the damages owed by Wells Fargo to USAA?

03:54:56 4 MR. BUNT: Could we have the first slide,
03:54:58 5 Mr. Huynh?

03:55:00 6 A. Yes. Based on my work in this case, I have concluded
03:55:06 7 that damages owed to USAA by Wells Fargo from the period
03:55:10 8 August 17th, 2018, through January 6th, 2020, the start of
03:55:16 9 the trial, are no less than 85 cents per remote deposit, or
03:55:24 10 approximately \$102.8 million during this damage period.

03:55:30 11 Q. (By Mr. Bunt) Mr. Weinstein, did you also summarize
03:55:34 12 benefits that you believe Wells Fargo obtained by using the
03:55:36 13 patents for the damage period in this case?

03:55:38 14 A. Yes, sir, I did. For the same period, I concluded that
03:55:46 15 Wells Fargo obtained profits of approximately \$1.2
03:55:52 16 billion in connection with mobile deposits made during this
03:55:56 17 period.

03:55:57 18 Q. What is it that enables you to come up with that
03:56:02 19 figure?

03:56:02 20 A. I'm an economist, and economists, among other things,
03:56:07 21 are trained to study financial performance in the market.
03:56:15 22 It starts with academic training, and it goes from there to
03:56:20 23 information about accounting records and generally,
03:56:26 24 economic, financial, and statistical information that
03:56:29 25 reflects the behavior of individuals and companies in the

03:56:34 1 marketplace.

03:56:35 2 So in -- in reaching my conclusions here, I relied
03:56:38 3 on my academic training, as well as my work experience
03:56:44 4 since leaving school.

03:56:46 5 Q. How long have you been doing this type of work?

03:56:48 6 A. 50 years.

03:56:49 7 Q. Mr. Weinstein, is your firm being compensated for the
03:56:52 8 work that you've done on this case?

03:56:53 9 A. Yes, sir, it is. My firm, Micronomics, is compensated
03:56:56 10 for time that I spend on this case at a rate of \$750.00 per
03:57:03 11 hour. It's also compensated for time spent by members of
03:57:08 12 my staff at Micronomics who helped me with this -- with
03:57:11 13 this engagement.

03:57:13 14 Q. Is it routine for experts like yourself and Wells
03:57:17 15 Fargo's experts to be compensated for the time spent
03:57:20 16 analyzing problems like this?

03:57:22 17 A. Yes, sir, it is.

03:57:23 18 Q. Can you tell the jury about your educational
03:57:27 19 background?

03:57:27 20 MR. BUNT: Next slide, Mr. Huynh.

03:57:29 21 A. I attended City College New York and graduated with a
03:57:38 22 Bachelor of Business Administration degree with honors in
03:57:42 23 economics.

03:57:42 24 MR. BUNT: Next slide, Mr. -- Mr. Huynh.

03:57:44 25 A. From there, I went to the University of Chicago and

03:57:47 1 received a Master of Arts degree, also in economics.

03:57:52 2 Q. (By Mr. Bunt) And did you receive any honors and
03:57:54 3 awards in connection with your education?

03:57:56 4 MR. BUNT: Next slide.

03:57:57 5 A. Yes, sir, I did. As an undergraduate, I received
03:58:01 6 certain awards for academic performance. I received
03:58:04 7 fellowships at the University of Chicago while I was there,
03:58:09 8 as well.

03:58:09 9 Q. (By Mr. Bunt) Have you been honored, since leaving
03:58:12 10 school, for your work as a professional economist?

03:58:15 11 A. I have. About 10 years ago, I received something
03:58:19 12 called the career achievement award from the Business and
03:58:23 13 Economics Alumni Society at City College for work done
03:58:31 14 since leaving school in the field of economics. I was the
03:58:33 15 first recipient of that award.

03:58:36 16 Q. Can you identify for the jury some of the clients that
03:58:39 17 you've had over the course of your career?

03:58:41 18 A. Yes. I've worked for eBay, and Dell, Ericsson, Intel.
03:58:50 19 Back home in Los Angeles, I've done work for the Rose Bowl
03:58:55 20 in connection with the economic impact of the Rose Parade,
03:59:00 21 and also other local economic impact studies.

03:59:04 22 I've also been retained by Attorneys General for a
03:59:09 23 number of different states, and I've worked for a number of
03:59:13 24 small entities that I'd never heard of until being engaged.

03:59:18 25 Q. (By Mr. Bunt) Have you --

03:59:23 1 MR. BUNT: Next slide, Mr. Huynh.

03:59:25 2 Q. (By Mr. Bunt) Have you written or spoken about some of
03:59:27 3 the work that you've done relating to the subjects of
03:59:30 4 patents and patent damages?

03:59:30 5 A. Yes. The first article that I published in connection
03:59:30 6 with the calculation of patent damages was in the Journal
03:59:38 7 of the Patent and Trademark Office Society back in 1988.

03:59:40 8 I've subsequently published occasionally other
03:59:44 9 articles, including one at the Federal Circuit Bar Journal.
03:59:48 10 And I'm an occasional speaker at various seminars and --
03:59:54 11 and groups on the subject of patent damages.

03:59:59 12 MR. BUNT: Your Honor, at this time, we would
04:00:00 13 offer Mr. Weinstein as an expert on the valuation of
04:00:04 14 intellectual property and the calculation of patent
04:00:07 15 damages.

04:00:07 16 THE COURT: Is there objection?

04:00:08 17 MR. HILL: No, sir, Your Honor.

04:00:09 18 THE COURT: Then with no objection, the Court will
04:00:11 19 recognize this witness as an expert in those designated
04:00:14 20 fields.

04:00:14 21 Please proceed.

04:00:15 22 MR. BUNT: Thank you, Your Honor.

04:00:16 23 Mr. Huynh, may I have Slide No. 8?

04:00:19 24 Q. (By Mr. Bunt) What materials did you consider in
04:00:22 25 reaching your conclusions in this case, Mr. Weinstein?

04:00:24 1 A. I had access to three categories of -- of information
04:00:28 2 in connection with my work. I started by reviewing the
04:00:35 3 patents-in-suit, and I had access to other information from
04:00:37 4 USAA, including internal correspondence and deposition
04:00:43 5 testimony and things of that sort.

04:00:47 6 I had access to information from Wells Fargo;
04:00:51 7 various internal presentations and correspondence, once
04:00:57 8 again testimony of company witnesses. And then, finally, I
04:01:01 9 had access to information which I acquired myself at
04:01:06 10 Micronomics. That's in the right-hand column. Industry
04:01:11 11 analyst reports, trade press, publications that relate to
04:01:17 12 mobile deposits. So to the industry generally, as well as
04:01:20 13 academic literature. And I also had an opportunity to
04:01:24 14 speak with Mr. Calman and Mr. McKinley.

04:01:28 15 Q. What is your understanding of why patent rights are
04:01:31 16 important in the United States?

04:01:34 17 A. To me as an economist, patent rights are important, in
04:01:40 18 that they provide the patent owner with an absolute right
04:01:44 19 to exclude anyone else from using those patents without
04:01:49 20 permission. The idea here is that by awarding those rights
04:02:00 21 to inventors, we encourage innovation, which ultimately is
04:02:04 22 good, not just for the inventor, but for consumers who
04:02:10 23 ultimately have access to those inventions.

04:02:14 24 So patent rights are designed to stimulate
04:02:18 25 invention, which ultimately will benefit all of us.

04:02:20 1 Q. Is there a name for the agreements that are reached
04:02:24 2 between patentholders and the entities that wish to have
04:02:29 3 access to those patents?

04:02:30 4 A. Yes, sir, there is. The permission I talked about that
04:02:34 5 can be granted by a patentholder to an entity that wishes
04:02:39 6 to use that patent is called a license agreement.

04:02:43 7 And with a license agreement, the parties agree
04:02:47 8 that, while the patentholder will continue to own the
04:02:52 9 patent, the licensee, the entity that wishes to use it and
04:02:54 10 have permission to use it, will now have the right to use
04:02:59 11 it. That's the permission.

04:03:01 12 Q. And do these license agreements typically have payment
04:03:04 13 terms associated with them?

04:03:05 14 A. Yes, sir, they do. Sometimes permission is granted as
04:03:15 15 a -- in exchange for a lump sum payment, in other words,
04:03:17 16 payment all at once for that permission.

04:03:20 17 Sometimes the permission involves what are called
04:03:26 18 running royalty payments, in other words, payments over
04:03:28 19 time sometimes that are tied to the use that is made of the
04:03:31 20 invention. And sometimes these agreements include a
04:03:34 21 combination of a lump sum payment, perhaps upfront, and
04:03:38 22 then running royalties over time.

04:03:40 23 Q. How do these license agreements come into existence?

04:03:43 24 A. They're negotiated by the parties. So if -- if I'm an
04:03:51 25 entity and I'm aware of -- of patents or intellectual

04:03:54 1 property that I want to use, I can enter into a negotiation
04:03:57 2 with the inventor or the patentholder, and they work out
04:04:03 3 terms for permission. So it's an actual real-world
04:04:06 4 negotiation.

04:04:07 5 MR. BUNT: Mr. Huynh, if we could have Slide
04:04:09 6 No. 9.

04:04:10 7 Q. (By Mr. Bunt) And, Mr. Weinstein, if we could turn
04:04:12 8 back to your work in this case. How do you go about
04:04:15 9 determining what determines fair compensation to USAA for
04:04:19 10 use of the patents-in-suit?

04:04:20 11 A. In this case, I began with the -- the patent statute.
04:04:27 12 And what it says is that to compensate for infringement,
04:04:33 13 payment should be in no event less than a reasonable
04:04:38 14 royalty for use made of the invention by the infringer.

04:04:41 15 And so that's the starting point. The starting
04:04:45 16 point says that payment should be at least a reasonable
04:04:52 17 royalty for use made of the invention.

04:04:54 18 Q. How does one determine damages adequate to compensate
04:04:58 19 for infringement?

04:04:59 20 A. Well, as I -- as I said earlier, in the real world, you
04:05:07 21 start with a natural negotiation for use of the -- of the
04:05:11 22 technology in question.

04:05:14 23 In -- in this case, in this situation, what you do
04:05:18 24 is -- is similar but not quite the same. And instead of an
04:05:25 25 actual negotiation, what you do in this context is you put

04:05:29 1 the parties together in what's called a hypothetical
04:05:35 2 negotiation. And it's called a hypothetical negotiation
04:05:36 3 because it didn't happen. There was no agreement between
04:05:40 4 the parties.

04:05:41 5 But what you do in order to figure out what
04:05:44 6 adequate compensation for infringement would be is you have
04:05:48 7 the parties engage in this hypothetical negotiation at the
04:05:54 8 time of first infringement.

04:05:55 9 And so that's why this slide says July 2018.
04:06:02 10 That's when the patents issued.

04:06:04 11 And at the hypothetical negotiation, on one side
04:06:06 12 is USAA, and it has the patents and it's making them
04:06:09 13 available to Wells Fargo. It's granting permission to
04:06:12 14 Wells Fargo. It's why the arrow goes that way.

04:06:15 15 And, in exchange, Wells Fargo is going to
04:06:18 16 compensate USAA for use of these patents. That's a
04:06:24 17 hypothetical negotiation, and it's that process that is
04:06:28 18 going to allow us to determine what fair compensation would
04:06:33 19 be.

04:06:33 20 And what I do as -- as an economist is I sort of
04:06:37 21 sit -- you can see me maybe in the lower right-hand corner
04:06:42 22 right above the exhibit number. And I sit and I watch this
04:06:46 23 hypothetical negotiation. I'm not -- I'm not there. I'm
04:06:49 24 not part of it. I just watch it and I look for the outcome
04:06:54 25 and that produces the result.

04:06:55 1 Q. Mr. Weinstein, have you prepared a slide that puts this
04:06:59 2 hypothetical negotiation into context?

04:07:00 3 A. Yes, sir, I have. So this provides just some
04:07:07 4 background about the hypothetical negotiation. And the
04:07:09 5 hypothetical negotiation itself will take place, on the
04:07:12 6 right-hand side, around July 2018 when the patents issued.
04:07:23 7 And the context for that negotiation is set forth in other
04:07:26 8 entries on the slide.

04:07:27 9 But, basically, Deposit@Home is launched by Wells
04:07:31 10 Fargo in 2006 -- excuse me, is launched by USAA in 2006,
04:07:40 11 Deposit@Mobile also by USAA in 2009.

04:07:41 12 Wells Fargo launches its Mobile Deposit product in
04:07:47 13 2012. And the damages period -- the damages that I've
04:07:51 14 calculated begin in 2018 after the patents issue and -- and
04:07:58 15 run through to the -- to the trial itself, to now.

04:08:01 16 Q. And does the fact that this hypothetical negotiation
04:08:04 17 takes place in 2018 have an impact on the outcome?

04:08:09 18 A. Well, it -- it does in the -- in the sense that Wells
04:08:19 19 Fargo had launched its product in -- in 2012.

04:08:25 20 By 2018, we just saw deposition testimony from
04:08:32 21 Mr. Ajami that the product had become table stakes. It had
04:08:37 22 become very important. And so Wells Fargo has -- has
04:08:40 23 obtained benefits during this period from mobile deposits.

04:08:45 24 And, finally, under -- under the patent statute
04:08:51 25 and the -- and the process that we follow here, the damages

04:08:53 1 period, it's time to pay up for those benefits beginning
04:08:57 2 in -- in 2018.

04:09:00 3 MR. BUNT: Can we go to the next slide?

04:09:02 4 Q. (By Mr. Bunt) Mr. Weinstein, between the date of Wells
04:09:04 5 Fargo's launch in 2012 of Mobile Deposit and the time of
04:09:09 6 the hypothetical negotiation, how did Mobile Deposit
04:09:11 7 perform in the market?

04:09:12 8 A. Mobile Deposit significantly outperformed the initial
04:09:20 9 expectations of how that product would do.

04:09:24 10 What we have here on the left-hand side, the low
04:09:27 11 and the high bar, are forecasts that were done in 2011 by
04:09:34 12 Wells Fargo of the number of mobile deposits that were
04:09:38 13 predicted for 2018.

04:09:40 14 So there was a forecast done in 2011 for something
04:09:44 15 that was going to happen in -- seven years later, in 2018.
04:09:47 16 And the -- the low and the high forecast are under
04:09:51 17 30 million mobile deposits.

04:09:54 18 Actually, by 2018, there were something in the
04:09:58 19 neighborhood of 80 million mobile deposits. In other
04:10:02 20 words, Wells Fargo's own internal forecast with respect to
04:10:06 21 this product was significantly outperformed.

04:10:17 22 MR. BUNT: If we could go to Slide No. 13,
04:10:19 23 Mr. Huynh.

04:10:20 24 Q. (By Mr. Bunt) Are there certain assumptions necessary
04:10:23 25 for purposes of this hypothetical negotiation?

04:10:24 1 A. Yes. So if you think back to that negotiating table
04:10:27 2 that we just saw and the hypothetical negotiation, this is
04:10:31 3 the second interesting part about that negotiation.
04:10:36 4 Sitting across from one another at that table at that
04:10:43 5 negotiation, USAA and Wells Fargo agree that the patents
04:10:47 6 are actually valid, infringed, and enforceable. As we know
04:10:53 7 in the real world, they do not agree about that.

04:10:57 8 But at this hypothetical negotiation, for purposes
04:11:00 9 of determining damages adequate to compensate for
04:11:05 10 infringement, there's no disagreement about that between --
04:11:07 11 between the parties. They agree.

04:11:09 12 So that's -- that's a fundamental difference
04:11:12 13 between the hypothetical negotiation that we are required
04:11:17 14 to follow here and the real world.

04:11:19 15 Second, unlike a real-world negotiation where
04:11:23 16 either side can get up and leave without reaching an
04:11:27 17 agreement, here, they can't leave until they reach an
04:11:31 18 agreement. We've got to get to the finish line. And both
04:11:35 19 sides understand that.

04:11:37 20 And the third thing that's different between the
04:11:41 21 hypothetical and the real-world negotiation is that both
04:11:45 22 sides actually understand the importance of the technology
04:11:51 23 associated with the products accused for infringement.

04:11:56 24 MR. BUNT: Mr. Huynh, if we could go to Slide No.
04:11:58 25 14.

04:12:04 1 Q. (By Mr. Bunt) When did USAA launch the mobile app for
04:12:09 2 customer remote deposit systems?

04:12:09 3 A. That occurred in 2009.

04:12:11 4 Q. And how was that launch described in the press?

04:12:14 5 A. So this is a -- a press report by AdAge in September of
04:12:22 6 2009 describing the release by USAA of mobile check deposit
04:12:33 7 technology.

04:12:33 8 And at the bottom in -- in this press report, the
04:12:38 9 description is that USAA represents the leading edge of
04:12:43 10 mobile banking technology. This is back in 2009 when it
04:12:46 11 was initially launched.

04:12:47 12 Q. What does leading edge refer to?

04:12:50 13 A. It's a combination of cutting edge and leading edge.
04:12:53 14 It's really important.

04:12:55 15 Q. And this is Plaintiff's Exhibit 143; is that correct,
04:12:59 16 sir?

04:12:59 17 A. Yes, sir.

04:13:01 18 MR. BUNT: Next slide, please, sir, Mr. Huynh.

04:13:04 19 Q. (By Mr. Bunt) Is there evidence that the industry
04:13:06 20 recognized at the time that mobile deposit capture would be
04:13:11 21 important?

04:13:11 22 A. Yes. This is an industry trade press called Celent.
04:13:17 23 And it's an abstract from an article in 2009. And it -- it
04:13:23 24 points out that mobile remote deposit capture is dis --
04:13:29 25 disruptive and that banks -- that's at the top -- and that

04:13:33 1 retail banks need to pay attention.

04:13:36 2 Q. What does it mean when it says disruptive? That
04:13:40 3 doesn't sound like a good thing.

04:13:41 4 A. Well, to me as an economist, a technology that's
04:13:46 5 disruptive is one that's really going to change things in
04:13:49 6 the marketplace. And in -- in this case, back in 2009 at
04:14:00 7 the time the product was introduced, there was at least
04:14:01 8 this recognition, that remote deposit capture could be
04:14:07 9 disruptive for retail banks and the industry.

04:14:10 10 Q. Did the author also describe this technology as
04:14:13 11 transformational?

04:14:15 12 A. It said that USAA has transformed the industry.
04:14:19 13 That's -- that's part of the discussion, and that's
04:14:21 14 consistent with disruptive.

04:14:24 15 MR. BUNT: May I have Slide No. 16, Mr. Huynh?

04:14:28 16 Q. (By Mr. Bunt) Did consumers like USAA's mobile app?

04:14:30 17 A. They did. This is in 2009, abstract from San Francisco
04:14:37 18 Business Times article referencing the fact that USAA's
04:14:44 19 mobile deposit app had by then become Apple's most popular
04:14:51 20 financial app, as of August 2009. That's roughly two years
04:14:56 21 after the iPhone was introduced.

04:15:00 22 MR. BUNT: Next slide, Mr. Huynh.

04:15:02 23 Q. (By Mr. Bunt) Did Wells Fargo recognize the importance
04:15:04 24 of MRDC?

04:15:06 25 A. Yes. I think we just -- we just heard this testimony,

04:15:08 1 actually, from Mr. Ajami, who testified that mobile check
04:15:22 2 deposit had become a table stakes capability, which to me
04:15:26 3 means it was really important that they have it in order to
04:15:29 4 compete with other commercial banks, and that the absence
04:15:34 5 of mobile check deposit was a significant pain point for
04:15:39 6 Wells Fargo.

04:15:39 7 Q. Can you remind the jury who Mr. Ajami is?

04:15:42 8 A. He's a Wells Fargo senior vice president.

04:15:45 9 MR. BUNT: Next slide, please.

04:15:47 10 Q. (By Mr. Bunt) Is there any other evidence that Wells
04:15:49 11 Fargo lacked the internal capability to create mobile
04:15:53 12 deposit, MRDC?

04:15:55 13 A. Yes. One of things that I do as an economist is I look
04:16:01 14 at other possibilities of creating the same product, and
04:16:08 15 that -- that could be relevant to the analysis -- typically
04:16:12 16 would be.

04:16:13 17 In this case, what I found in -- in a 2011 Wells
04:16:19 18 Fargo's planning document -- that's before Wells Fargo
04:16:22 19 actually released its mobile deposit product, but back in
04:16:27 20 2011, it was -- it was considering creating a product
04:16:32 21 itself. And what it said in this document is that the time
04:16:37 22 to build would set the project back 9 to 18 months and that
04:16:41 23 the technology could get outdated because they didn't have
04:16:45 24 the kind of focused research and development support that
04:16:49 25 they would need.

04:16:50 1 So my takeaway as an economist from this was that
04:17:01 2 Wells Fargo thought about creating its own product but
04:17:03 3 decided not to pursue it for -- for several reasons.

04:17:04 4 Q. Does the information on this slide come from
04:17:09 5 Plaintiff's Exhibit No. 14, Mr. Weinstein?

04:17:11 6 A. It does.

04:17:12 7 Q. Are you --

04:17:13 8 MR. BUNT: Can we have the next slide, Mr. Huynh?

04:17:16 9 Q. (By Mr. Bunt) Are you aware of any evidence of whether
04:17:19 10 Wells Fargo viewed its specialized scanner system as a
04:17:19 11 commercially viable option instead of mobile deposit --
04:17:28 12 mobile remote deposit?

04:17:28 13 A. Yes, we're -- we're still in the planning stage for
04:17:28 14 Wells Fargo. This document, you can see on the left, is
04:17:31 15 January 2011 before the Wells Fargo mobile deposit product
04:17:35 16 had been released. And they're considering other
04:17:45 17 alternatives -- in this case, a specialized scanning
04:17:48 18 system.

04:17:48 19 And the conclusion from this particular planning
04:17:54 20 study, you can see they've drawn an X over the scanner to
04:17:57 21 the right, is that pursuing that approach was not a viable
04:18:05 22 option for Wells Fargo. It would cut their profitability
04:18:08 23 dramatically, and only roughly 20 percent of their
04:18:12 24 customers would even be eligible to use specialized
04:18:17 25 scanners.

04:18:17 1 So Wells Fargo, in addition to thinking about
04:18:20 2 creating its own system, considered specialized scanners
04:18:24 3 and rejected that idea.

04:18:25 4 Q. And that document the jury's looking at is Plaintiff's
04:18:30 5 Exhibit No. 1296; is that correct?

04:18:31 6 A. Yes, sir.

04:18:31 7 Q. How did you decide what the parties would have agreed
04:18:34 8 upon back at the time of the hypothetical negotiation?

04:18:38 9 MR. BUNT: If we could have Slide No. 20.

04:18:40 10 A. So this is the third part of the hypothetical
04:18:47 11 negotiation framework. You have a hypothetical
04:18:50 12 negotiation. You have assumptions about the patents being
04:18:53 13 valid and infringed and enforceable and recognition that
04:18:57 14 the parties have to reach an agreement.

04:18:58 15 And then the third part is identified as the
04:19:04 16 Georgia-Pacific factors. And the Georgia-Pacific factors
04:19:04 17 are a checklist of things that the parties to this
04:19:08 18 negotiation might want to consider as they negotiate for
04:19:15 19 permission to use the -- the technology in question. It
04:19:19 20 comes from a -- a prior patent case many years back, and
04:19:25 21 it's -- it's just the checklist.

04:19:27 22 And the idea is that each side is going to be
04:19:30 23 thinking about these factors. They're not all relevant
04:19:35 24 each time you -- you try and determine what fair payment
04:19:39 25 would be, but the idea is to consider them and think about

04:19:41 1 the ones that turn out to be relevant. And both sides
04:19:44 2 would have access -- have these -- these factors in mind.
04:19:48 3 So it's called the -- a Georgia-Pacific analysis.

04:19:51 4 Q. (By Mr. Bunt) So are you saying that the -- these
04:19:54 5 Georgia-Pacific factors will also be used by Wells Fargo's
04:19:57 6 damage expert?

04:19:58 7 A. Yes. Wells Fargo's damage expert in this case uses
04:20:03 8 the same Georgia-Pacific analysis, the hypothetical
04:20:08 9 negotiation framework, and the assumptions about validity
04:20:14 10 and infringement. And they need to reach an agreement, as
04:20:17 11 I do. We -- we agree about the framework for getting to
04:20:21 12 what a reasonable royalty or a reasonable payment would be
04:20:24 13 in connection with this. Both sides do agree about that.

04:20:28 14 Q. So did you consider all 15 of these factors in
04:20:31 15 developing your reasonable royalty measure of damages?

04:20:33 16 A. Yes, sir, I considered all 15. Some were more
04:20:36 17 important than others in this case, and so I focus on
04:20:39 18 those. But I considered them all.

04:20:40 19 MR. BUNT: Let's go to Slide 21.

04:20:42 20 Q. (By Mr. Bunt) And why don't you tell us where you
04:20:44 21 began?

04:20:45 22 A. So, as I said, this is a checklist of 15 factors. I
04:20:49 23 began in this case with No. 6. Could have begun with maybe
04:20:56 24 some -- some of the others, but No. 6 is a good starting
04:20:59 25 point. And it's the effect of selling the patented product

04:21:03 1 and promoting the sales of other products of the licensee.
04:21:08 2 And so that's one of the things on this checklist that the
04:21:12 3 parties would think about.

04:21:16 4 And translating that into something else means
04:21:19 5 does selling -- does -- does access -- providing access to
04:21:25 6 mobile deposits benefit the entity that has access to
04:21:31 7 mobile deposits by allowing it to sell and make profits on
04:21:34 8 other things? That's -- that's Item 6.

04:21:38 9 Q. And the entity in question here would be Wells Fargo;
04:21:42 10 is that right?

04:21:42 11 A. Yes, sir.

04:21:42 12 Q. So, Mr. Weinstein --

04:21:45 13 MR. BUNT: If we could go to Slide No. 22.

04:21:48 14 Q. (By Mr. Bunt) Mr. Weinstein, let me show you a 2012
04:21:51 15 Wells Fargo internal study in connection with mobile
04:21:54 16 deposits. And can you tell me what information does this
04:21:57 17 provide in connection with your analysis of Georgia-Pacific
04:22:00 18 Factor No. 6?

04:22:01 19 A. So this is another Wells Fargo planning document, and
04:22:06 20 here, what it says in the highlighted portions are: Mobile
04:22:11 21 deposit customers are one and a half more times likely to
04:22:14 22 generate an annual product -- profit of \$2,000.00 and have
04:22:19 23 higher deposit balances. And it also says: Mobile deposit
04:22:23 24 customers have an approximately 50 percent lower attrition
04:22:27 25 rate. In other words, they're more likely to stay with the

04:22:31 1 bank. So these are additional benefits associated with
04:22:33 2 having permission to use mobile deposits.

04:22:38 3 MR. BUNT: For the record, that's PX-329.

04:22:42 4 Q. (By Mr. Bunt) And then this next slide, yes, was there
04:22:45 5 any other evidence that you considered regarding the
04:22:47 6 importance of MRDC to Wells Fargo?

04:22:51 7 A. Yes. This next one, November 2010, another Wells Fargo
04:22:57 8 planning document, points out that with mobile deposits,
04:23:01 9 there will be 20 percent new deposits. In other words,
04:23:07 10 by -- by having the ability to offer the mobile deposit
04:23:13 11 channel, Wells Fargo will be able to increase its deposits
04:23:17 12 over and above what they would obtain if they just had ATMs
04:23:23 13 and bank tellers.

04:23:25 14 Q. Mr. Weinstein, is that PX-1069 that you're reading
04:23:31 15 from?

04:23:31 16 A. It is.

04:23:31 17 Q. Did you also look at the other Georgia-Pacific factors?

04:23:33 18 A. I did. So the next two that I would talk about are
04:23:37 19 Factors 8 and 11. I grouped them because they kind of
04:23:40 20 relate to the same thing, which is the profitability of the
04:23:45 21 product in question and the -- the use that's been made of
04:23:50 22 that product in this case by Wells Fargo.

04:23:52 23 Q. What did you consider in your analysis of these
04:23:54 24 factors?

04:23:58 25 MR. BUNT: Next slide, please.

04:24:00 1 A. So here, I -- I was interested in seeing how successful
04:24:07 2 Wells Fargo had been in connection with offering this
04:24:09 3 product. And so what I did is I tabulated the number of
04:24:15 4 Wells Fargo MRDC customers by year, and that's shown in the
04:24:21 5 second column working its way down, the profit per account.
04:24:26 6 And those figures came directly from Wells Fargo. And on
04:24:30 7 the right-hand side are the profits from checking accounts.

04:24:35 8 And during the damage period, which isn't
04:24:37 9 precisely shown on here because this doesn't break out a
04:24:40 10 part of 2018 and a part of 2019, but the profits associated
04:24:46 11 with the number of accounts shown on the second column
04:24:56 12 times the profit per account, sum up to approximately
04:25:00 13 \$1.2 billion. That's just during the damage period.

04:25:08 14 Q. (By Mr. Bunt) Have you tabulated the number of mobile
04:25:11 15 deposits received by Wells Fargo since the infringing MRDC
04:25:15 16 system was launched?

04:25:16 17 A. Yes. This next slide contains that tabulation. You
04:25:20 18 can see the -- that the volume -- the number of mobile
04:25:25 19 deposits over time has been increasing at Wells Fargo.
04:25:30 20 And, again, although it's not precisely shown, if you pro
04:25:34 21 rate the figures for 2018 beginning in -- during the damage
04:25:40 22 period and then come forward to roughly the time of trial,
04:25:43 23 it's approximately 120.9 million mobile deposits made
04:25:49 24 during that period. We're up to a pace of close to
04:25:53 25 90 million mobile deposits per year by 2019.

04:25:57 1 Q. And that number at the bottom, is that dollars or is
04:26:02 2 that mobile deposits that have actually been made?

04:26:04 3 A. No, that's mobile deposits. It's not dollars. That's
04:26:08 4 just the number of mobile deposits.

04:26:10 5 MR. BUNT: All right. If we could go to Slide 27.

04:26:14 6 Q. (By Mr. Bunt) Did you also examine other
04:26:17 7 Georgia-Pacific factors?

04:26:18 8 A. Yes. The next two that I grouped together has -- has
04:26:21 9 to do with the relationship between Wells Fargo and USAA.
04:26:26 10 And other things equal, you would prefer not to give your
04:26:32 11 technology or permission to use your technology to a
04:26:34 12 competitor because it's going to have a direct impact on
04:26:37 13 you. If you're talking about giving permission to an
04:26:42 14 entity that you don't compete with, you're -- you're more
04:26:48 15 ready to do something along those lines than to provide
04:26:51 16 permission to a competitor.

04:26:53 17 And so that's what these Georgia-Pacific factors
04:26:56 18 here address.

04:26:57 19 Q. Are Wells Fargo and USAA competitors to one another?

04:27:01 20 A. Yes, sir, they are.

04:27:04 21 MR. BUNT: Next slide. Thank you.

04:27:05 22 A. This is actually a Wells Fargo ad. It's a Wells Fargo
04:27:09 23 ad, and it shows that Wells Fargo is targeting members of
04:27:16 24 the USAA core constituency. It's -- it's directing its
04:27:23 25 advertising right at USAA's core customer base. So,

04:27:27 1 clearly, they're -- they're competitors.

04:27:30 2 Q. (By Mr. Bunt) And that's PX-1083, Mr. Weinstein?

04:27:33 3 A. Yes, sir.

04:27:34 4 Q. Again, why is that important to your analysis that
04:27:37 5 they're direct competitors?

04:27:38 6 A. Well, other things equal, you don't want to help your
04:27:41 7 direct competitor. And so other things equal, if you're
04:27:44 8 going to grant permission to use your technology to a
04:27:49 9 competitor, you're going to want to get more for it than if
04:27:52 10 you grant permission to an entity that is not operating in
04:27:56 11 the same space that you are.

04:27:58 12 Q. Have you seen any other evidence that they compete?

04:28:01 13 A. Yes. This is testimony from Mr. Rosati at Wells Fargo.
04:28:06 14 And -- and he confirms what's -- what's fairly evident from
04:28:12 15 that last ad that we saw that USAA and Wells Fargo compete
04:28:16 16 with one another.

04:28:17 17 Q. Does Wells Fargo charge USAA for services that it
04:28:20 18 provides to USAA members?

04:28:24 19 A. Yes, it does. We -- we saw a slide from, I believe,
04:28:28 20 Mr. McKinley, but Wells Fargo charges USAA each time a USAA
04:28:35 21 member uses Zelle, which is a method of basically wire
04:28:41 22 transferring money from one account to another.

04:28:46 23 Q. Why is that important to your analysis?

04:28:48 24 A. Well, it -- it -- it reflects the fact that Wells Fargo
04:28:51 25 is willing to accept what I call a running royalty for use

04:28:55 1 of its technology. It charges each time that a USAA member
04:29:02 2 actually uses this -- this particular technology.

04:29:07 3 Q. What were the next Georgia-Pacific factors that you
04:29:10 4 considered?

04:29:12 5 A. The next ones I considered, again, I've grouped a few
04:29:15 6 together, relate to the benefits and advantages associated
04:29:21 7 with using the -- the property in question. And so those
04:29:25 8 are GP Factors 9, 10, and 12.

04:29:30 9 Q. Did you see any evidence whether Wells Fargo viewed its
04:29:35 10 specialized scanner system as a commercially viable option?

04:29:38 11 A. Yes. And this is a quick look at a slide that I
04:29:41 12 testified about previously. They thought about commercial
04:29:45 13 scanners, this was in their 2011 planning document, and
04:29:47 14 crossed it out, rejected the idea as being not commercially
04:29:52 15 viable, too expensive, and not able to support their entire
04:29:57 16 customer base.

04:29:59 17 MR. BUNT: Could we go to the next slide?

04:30:02 18 Q. (By Mr. Bunt) How much do these specialized desktop
04:30:06 19 check scanners cost?

04:30:08 20 A. They were expensive. And they cost from \$500.00 to
04:30:15 21 considerably more. And, clearly, that wouldn't be a viable
04:30:16 22 approach to -- to making mobile deposits. This is
04:30:21 23 exhibit -- Plaintiff's Exhibit 240.

04:30:24 24 MR. BUNT: And if we could go to Slide 34.

04:30:28 25 Q. (By Mr. Bunt) What would be the impact to Wells Fargo

04:30:30 1 of not offering MRDC?

04:30:33 2 A. As we've seen, MRDC was table stakes. That's what
04:30:41 3 Wells Fargo's vice president said, table stakes.

04:30:44 4 And what we find in this financial trade press is
04:30:50 5 that mobile check deposit capture users by 2015 had now
04:31:00 6 outnumbered those using specialized scanners by more than
04:31:04 7 40 to 1. In other words, specialized scanners were only
04:31:11 8 used by roughly two and a half percent of mobile deposit
04:31:14 9 users, and the other 97 percent were making mobile deposits
04:31:19 10 from their devices.

04:31:23 11 Q. What does that suggest about whether Wells Fargo would
04:31:26 12 lose customers to banks who did offer MRDC if it were
04:31:30 13 unable to offer it?

04:31:31 14 A. Well, this would suggest that they'd lose 97 percent of
04:31:35 15 their customers to other banks.

04:31:37 16 Q. Can we go --

04:31:39 17 A. Which is consistent with what Mr. Ajami said about
04:31:43 18 mobile deposit being table stakes. That means if you don't
04:31:46 19 have it, you're going to lose customers.

04:31:48 20 MR. BUNT: Can we go to the next slide?

04:31:51 21 Q. (By Mr. Bunt) Did USAA customers find desktop
04:31:55 22 scanners acceptable over MRDC?

04:31:58 23 A. No, this is from USAA data, not Wells Fargo data. But
04:32:00 24 during the period May of 2014 to December 2018, roughly
04:32:06 25 3 percent of mobile deposit users were using desktop remote

04:32:15 1 scanners and -- and, by the way, these were not specialized
04:32:19 2 scanners. These were off-the-shelf scanners. But only
04:32:23 3 3 percent of the USAA's deposits came from remote scanners,
04:32:28 4 and 97 percent came from mobile devices.

04:32:36 5 MR. BUNT: Can we go to the next slide?

04:32:38 6 Q. (By Mr. Bunt) What would be the impact on Wells Fargo
04:32:42 7 if it could not offer MRDC and 97 percent of its customers
04:32:43 8 did not accept the desktop scanners solution?

04:32:45 9 A. Well, if Wells Fargo lost 97 percent of its customers,
04:32:50 10 it would lose the profits that it makes on those 97 percent
04:32:51 11 of those customers. And during the -- the damage period,
04:32:55 12 that would -- that would amount to approximately \$1.2
04:33:01 13 billion in profits associated with those customers that
04:33:09 14 would be lost if those customers went elsewhere.

04:33:11 15 MR. BUNT: Next slide, please.

04:33:13 16 Q. (By Mr. Bunt) Did Wells Fargo consider duplicate fraud
04:33:16 17 to be a serious problem with respect to MRDC?

04:33:19 18 A. Yes, it did. It recognized that MRDC presented a new
04:33:28 19 kind of fraud risk that previously had not existed. That
04:33:35 20 new kind of fraud risk is associated with the fact that the
04:33:38 21 consumer now kept the check. Instead of depositing it in
04:33:42 22 an ATM or giving it to a teller, the consumer now had the
04:33:47 23 check, which provided opportunities or possibilities that
04:33:52 24 fraud would occur with that check still in the hands of the
04:33:56 25 consumer.

04:33:56 1 And so back in 2009 and 2010, when Wells Fargo was
04:34:03 2 still thinking about providing a mobile deposit product,
04:34:08 3 it's -- it's observing at the bottom that mobile deposits
04:34:12 4 generate additional risk to manage and monitor. The
04:34:16 5 primary risk is of duplicate deposits. In 2010, at the top
04:34:23 6 the same thing, the primary threat of MRDC is duplicate
04:34:27 7 deposits.

04:34:28 8 Wells Fargo recognized that because the consumers
04:34:33 9 still had the check, and to -- I'll stop there.

04:34:37 10 Q. Can those Wells Fargo documents be found in Plaintiff's
04:34:41 11 Exhibit 436 and PX-1470?

04:34:45 12 A. Yes, sir.

04:34:46 13 Q. Is there testimony from Wells Fargo's corporate
04:34:49 14 representative about the importance of the claims of the
04:34:53 15 '605 patent with respect to duplicate detection?

04:34:56 16 A. Yes, we -- we just saw this testimony from Mr. Darpally
04:34:59 17 who indicated that he couldn't think of any other way to
04:35:03 18 perform duplicate detection besides mobile deposits.

04:35:12 19 Q. I'm sorry, were you done?

04:35:14 20 MR. BUNT: Okay. If we can have the next slide.

04:35:17 21 Q. (By Mr. Bunt) Did Mr. Darpally also provide testimony
04:35:23 22 regarding customer authentication?

04:35:23 23 A. Yes, he did. It was in that same deposition that we
04:35:26 24 just saw portions of in which he said that he couldn't
04:35:29 25 think of any other way to perform customer authentication

04:35:35 1 that does not involve receipt of that information from the
04:35:40 2 mobile app.

04:35:41 3 Q. Would it be relevant if Mr. Darpally had provided
04:35:44 4 information about different ways to provide duplicate
04:35:48 5 detection or customer authentication?

04:35:51 6 A. Yes, sir, it would.

04:35:52 7 Q. And how so?

04:35:53 8 A. As -- as I testified previously, one of the things that
04:35:59 9 I as an economist consider is whether or not you can
04:36:04 10 provide the benefits associated with the technology in
04:36:08 11 question through alternatives. Because if you can, then
04:36:11 12 those alternatives will impact what you're willing to pay
04:36:15 13 for permission to use the technology in question. So, yes,
04:36:18 14 that would have been relevant, but...

04:36:21 15 Q. Do those non-infringing alternatives, if there is one,
04:36:24 16 do they provide a cap on the amount that an infringer would
04:36:28 17 pay for use of the patents?

04:36:31 18 A. A commercially viable non-infringing alternative would
04:36:36 19 provide a cap. By commercially viable, I mean, if -- if it
04:36:40 20 could provide the same benefits as the technology that
04:36:45 21 we're talking about and still be profitable -- as
04:36:51 22 profitable as the technology we're talking about, then that
04:36:54 23 would set a cap as to what one would pay for permission.
04:37:01 24 Because if you could do it some other way, you wouldn't pay
04:37:04 25 more.

04:37:05 1 MR. BUNT: Next slide.

04:37:07 2 Q. (By Mr. Bunt) Have you seen any evidence showing that
04:37:09 3 bank customers had concerns about fraud with respect to
04:37:12 4 MRDC?

04:37:12 5 A. Yes. This is a 2017 report by a financial advisory
04:37:22 6 trade press firm called Futurion. And by then, 2017,
04:37:29 7 mobile deposits had been in the market for -- for a while.

04:37:34 8 And what -- and what they say is FIs, financial
04:37:38 9 institutions, must unequivocally assure customers that
04:37:40 10 mobile deposit is every bit as secure as an ATM or bank
04:37:44 11 branch. In other words, it's really important for the
04:37:52 12 banks and other financial institutions to provide assurance
04:37:58 13 to -- to their customers about security associated with
04:38:00 14 mobile deposits.

04:38:02 15 MR. BUNT: And that's Plaintiff's Exhibit 5, for
04:38:05 16 the record.

04:38:05 17 Q. (By Mr. Bunt) Did Wells Fargo recognize the need for
04:38:09 18 mobile deposits to be as safe as ATMs in order to satisfy
04:38:12 19 customer concerns about fraud?

04:38:13 20 A. Yes, sir. Here we're still in the planning stage at
04:38:16 21 Wells Fargo. August 2010. And in their planning document,
04:38:21 22 they point out that a mobile banking customer who can
04:38:26 23 deposit checks at the ATM has to be comfortable about the
04:38:34 24 risk of duplicate deposits associated with retaining the
04:38:42 25 paper check.

04:38:44 1 And that's -- that's a concern that Wells Fargo is
04:38:47 2 indicating about the risk that it faces from -- from the
04:38:53 3 fact that the consumers keep their checks.

04:38:56 4 Q. And is that Plaintiff's Exhibit No. 1471 that we're
04:39:00 5 looking at, Mr. Weinstein?

04:39:01 6 A. It is, sir.

04:39:01 7 MR. BUNT: If we could go to the next slide.

04:39:04 8 Q. (By Mr. Bunt) What was the performance of USAA's
04:39:06 9 patented MRDC system with respect to safety as compared to
04:39:11 10 ATMs?

04:39:11 11 A. Well, safety of mobile deposits versus ATMs is
04:39:15 12 something that USAA monitored. And in this slide, I have
04:39:22 13 monthly information from roughly December 2017 to December
04:39:29 14 2018.

04:39:31 15 The big -- the big reddish-brownish bars are the
04:39:37 16 percentage of accounts which were subject to ATM fraud
04:39:44 17 during the particular month. And the bars near the bottom
04:39:49 18 are the percentage of accounts during the same months that
04:39:54 19 were subject to frauds associated with mobile deposit.

04:39:58 20 And what you can see is that while the experience
04:40:01 21 varies from month-to-month, the loss rate expressed as
04:40:06 22 those percentages was significantly better with respect to
04:40:11 23 mobile deposits than it was with respect to ATMs. In other
04:40:15 24 words, despite the fact that the consumer keeps the check,
04:40:19 25 the fraud rates were lower.

04:40:22 1 Q. Is there any evidence that Wells Fargo believed that
04:40:25 2 the performance of its MRDC system was as safe as ATMs?

04:40:30 3 A. Yes, in 2 -- 2016, this is another one of those
04:40:35 4 Futurion Reports. This is a screenshot at a Wells Fargo
04:40:44 5 ATM. And what came up on the screen there is that Wells
04:40:48 6 Fargo's mobile deposits are secure, easy, and convenient.
04:40:54 7 In other words, Wells Fargo is encouraging -- encouraging
04:40:58 8 people who are making mobile -- ATM deposits to at least
04:41:03 9 consider the possibility of making a mobile deposit next
04:41:07 10 time.

04:41:07 11 Q. And that's Plaintiff's Exhibit No. 206.

04:41:11 12 Have you also heard testimony from Wells Fargo's
04:41:13 13 corporate representative about the safety of MRDC as
04:41:16 14 compared to ATM?

04:41:17 15 A. Yes. We -- we just heard some testimony or saw some
04:41:21 16 testimony from Mr. Ajami about ATMs being roughly as safe
04:41:30 17 as mobile deposits.

04:41:32 18 MR. BUNT: Could we go to the next slide?

04:41:35 19 Q. (By Mr. Bunt) Was Wells Fargo aware of other benefits
04:41:38 20 associated with MRDC?

04:41:39 21 A. Yes. This is, again, from a Wells Fargo planning
04:41:43 22 document before they released the mobile deposit project --
04:41:47 23 product. It's 2011. And we've highlighted four things on
04:41:53 24 this slide.

04:41:53 25 The first one is that Wells Fargo saves money with

04:42:03 1 mobile deposits relative to deposits at ATM channels and
04:42:09 2 deposits, quote, at the store, close quote, meaning with a
04:42:12 3 teller at the bank. In other words, Wells Fargo increases
04:42:15 4 its profits every time a consumer makes a mobile deposit
04:42:19 5 instead of depositing it some other way.

04:42:22 6 Second, it talks about this wow factor, which, I
04:42:27 7 guess, most companies like to achieve, which is have
04:42:32 8 consumers think highly of your company generally and -- and
04:42:36 9 at least in this planning document, there was some -- some
04:42:40 10 thought given to the fact that offering mobile deposits
04:42:44 11 would create a wow factor in the minds of consumers for
04:42:48 12 Wells Fargo.

04:42:48 13 Nos. 3 and 4 that are highlighted, mobile deposits
04:42:53 14 are about 45 percent more profitable. Mobile customers
04:42:58 15 are. Than other Wells Fargo customers who have the app but
04:43:04 16 don't make a mobile deposit.

04:43:06 17 And then, finally, as -- as noted before, they're
04:43:09 18 much less likely to leave the bank. They're likely to stay
04:43:13 19 longer.

04:43:13 20 Q. Did you see evidence that Wells Fargo actually saved or
04:43:16 21 obtained cost savings in connection with mobile deposit?

04:43:20 22 A. Yes, sir, I did. Wells Fargo made available
04:43:24 23 information on the cost that it actually incurred in
04:43:28 24 connection with deposits made at each channel. And so this
04:43:32 25 slide depicts a summary of those costs for the period 2014

04:43:38 1 to 2018.

04:43:41 2 Every time there's a deposit with a teller at a
04:43:45 3 bank, it costs Wells Fargo about \$2.46. If the deposit was
04:43:50 4 made at an ATM, it cost Wells Fargo about \$1.41. And if it
04:43:57 5 was a mobile deposit, it cost Wells Fargo about 36 cents.

04:44:01 6 And what that means on Line 2 is that the cost
04:44:04 7 savings per deposit during this period, 2014 to 2018,
04:44:11 8 varied between \$1.06, if it was compared with an ATM
04:44:16 9 deposit, and \$2.11, if it was compared with a teller
04:44:21 10 deposit.

04:44:22 11 And there were, finally, approximately
04:44:27 12 120.9 million mobile deposits made by consumers during the
04:44:32 13 damage period.

04:44:32 14 Q. Are ATM deposits a perfect substitute for mobile --
04:44:37 15 mobile deposit?

04:44:37 16 A. No, they're not, because they don't provide the same
04:44:42 17 flexibility to consumers that mobile deposits do. You can
04:44:45 18 do a mobile deposit from far more locations than you can
04:44:52 19 even with a widespread ATM network.

04:44:55 20 Q. At the hypothetical negotiation, Mr. Weinstein, how
04:44:58 21 would the parties consider the various benefits you've been
04:45:02 22 talking about?

04:45:04 23 A. So if we come back to that hypothetical negotiation
04:45:09 24 with the parties sitting across one another at that -- at
04:45:12 25 that negotiating table, each side is trying to get the best

04:45:20 1 deal that it can. And they're thinking about -- they're
04:45:22 2 thinking about the -- the profits that Wells Fargo makes
04:45:27 3 with respect to its mobile deposit customers who it -- most
04:45:32 4 of whom it would lose to other banks if it didn't offer
04:45:35 5 that product.

04:45:38 6 They're thinking about the cost savings that we
04:45:40 7 just looked at, and they're thinking about the benefits
04:45:43 8 that Wells Fargo brings to the table through its -- its
04:45:48 9 brand name and its ecosystem and its widespread network and
04:45:53 10 things like that.

04:45:54 11 And so they're sitting across the table at this
04:45:57 12 hypothetical negotiation, and they're each trying to get
04:45:59 13 the best deal they possibly can.

04:46:01 14 Q. So how do you think the negotiation would play out?

04:46:04 15 A. Well, as I said, I'm -- I'm sitting on the side there
04:46:09 16 invisible in the -- in the negotiating room, but I think,
04:46:16 17 as with all negotiations, they would reach some sort of
04:46:20 18 compromise position. USAA wouldn't be able to get
04:46:23 19 \$1.2 billion, all of those profits. And, on the other
04:46:30 20 hand, they would insist upon fair payment.

04:46:33 21 What I think ultimately would happen is that the
04:46:37 22 parties would have looked at those cost differences between
04:46:40 23 ATMs and mobile deposits and the savings that Wells Fargo
04:46:47 24 gets from mobile deposits relative to ATMs and use that as
04:46:53 25 a surrogate for the benefits associated with mobile

04:47:03 1 deposits, and negotiate around those benefits.

04:47:04 2 MR. BUNT: Can we go to the next slide?

04:47:06 3 Q. (By Mr. Bunt) So did you actually calculate a royalty
04:47:15 4 based on the cost savings benefits that Wells Fargo
04:47:15 5 received from the accused mobile deposit app?

04:47:15 6 A. Yes, sir, I did.

04:47:18 7 Q. Can you explain to us how you did that?

04:47:20 8 A. This -- this slide contains the same information or
04:47:24 9 some of the same information that we just looked at. It's
04:47:26 10 for the period of 2014 to 2018.

04:47:30 11 I have the average cost associated with an ATM
04:47:37 12 deposit, an average mobile deposit cost, and the difference
04:47:41 13 is about \$1.06, and so that's -- in the first instance the
04:47:48 14 benefit that -- that goes to Wells Fargo from a consumer
04:47:52 15 who uses a mobile deposit instead of an ATM.

04:47:56 16 And then there's an additional fee to that entity,
04:48:00 17 EWS, that we heard about Early Warning Service, that has to
04:48:05 18 be paid in connection with each one of these deposits. And
04:48:08 19 so after you subtract the full amount of that fee, the
04:48:11 20 difference is -- is about 97 -- 97 cents -- 97 or 98 cents.

04:48:20 21 And in the first instance, that's the benefit that
04:48:23 22 Wells Fargo gets from a mobile deposit relative to an ATM
04:48:28 23 deposit, which, of course, is smaller than the benefit that
04:48:33 24 they get if it's relative to a -- a deposit with a teller.

04:48:37 25 All right. So that -- that gets us down to

04:48:40 1 that -- to that step. That's the benefit.

04:48:42 2 Q. And at that hypothetical negotiation, did you consider
04:48:46 3 both higher -- higher figures and lower figures as part of
04:48:51 4 your calculations?

04:48:51 5 A. I did. The higher figure has to do with profits on
04:49:01 6 MRDC customers that we saw that was close to a billion
04:49:05 7 dollars. And the lower figure has to do with benefits
04:49:10 8 associated with reducing the amount of fraud. And we saw
04:49:14 9 that mobile deposits are safer than ATMs. And so that
04:49:25 10 would produce a -- a lower figure.

04:49:26 11 And so when I look at ATMs versus mobile deposits,
04:49:28 12 I'm -- I'm winding up sort of between the high end and the
04:49:32 13 low end, and I'm thinking that that difference would be a
04:49:37 14 valuable surrogate that measures the incremental benefits
04:49:42 15 associated with mobile deposits that the parties would
04:49:46 16 negotiate over.

04:49:46 17 MR. BUNT: Can we go to the next slide, Mr. Huynh?

04:49:49 18 Q. (By Mr. Bunt) What is the next step in your analysis?

04:49:51 19 A. Well, there was one -- there was one more step on
04:49:54 20 the -- on the last slide --

04:49:55 21 MR. BUNT: I'm sorry, go back.

04:49:57 22 A. -- which involves how the parties -- how the parties
04:49:59 23 would actually split those benefits. And the benefits that
04:50:03 24 I calculate as -- as between the difference and the costs
04:50:07 25 were about 97.6 percent.

04:50:10 1 And so that's what's on this negotiating table
04:50:13 2 with respect to permission for this technology. And the
04:50:18 3 question is, how would the parties at this hypothetical
04:50:22 4 negotiation split those benefits? How would they decide
04:50:25 5 how much USAA gets and how much Wells Fargo gets? And we
04:50:28 6 already know that they've wound up -- by looking at -- at
04:50:33 7 this cost difference, they've wound up somewhere in the
04:50:36 8 middle to begin with, as between various benefits that they
04:50:39 9 could have been negotiating over.

04:50:40 10 And so for purposes of the -- of the --
04:50:43 11 determining what the split would be, what I did as an
04:50:46 12 economist is I looked at the Wells Fargo annual return on
04:50:52 13 equity as it publishes it -- that information in its -- in
04:50:56 14 its annual reports each -- each year.

04:51:00 15 And what that does is it allows Wells Fargo to
04:51:02 16 make the same profits in connection with mobile deposits in
04:51:07 17 terms of return on equity that it makes on its other
04:51:12 18 investments. It keeps Wells Fargo whole for any
04:51:16 19 investments that it's made in connection with mobile
04:51:19 20 deposits.

04:51:19 21 And so I determined that, based on that, Wells
04:51:22 22 Fargo would keep about 13.4 percent because that's its
04:51:29 23 return on equity. And USAA would get about 86.6 percent of
04:51:33 24 the incremental benefit associated with mobile deposits.
04:51:37 25 And that produces a royalty rate of 85 cents per deposit.

04:51:42 1 Q. (By Mr. Bunt) All right.

04:51:43 2 MR. BUNT: Now let's turn back to that next slide.

04:51:46 3 Q. (By Mr. Bunt) So what is the next step in your
04:51:47 4 analysis?

04:51:48 5 A. So the final step is to take the number of mobile
04:51:54 6 deposits, approximately 120.9 million, and multiply that
04:51:59 7 number times the royalty per deposit of 85 cents. And when
04:52:05 8 you do that math, I believe that the parties would have
04:52:10 9 wound up at the conclusion of the hypothetical negotiation
04:52:14 10 with agreement that Wells Fargo would pay reasonable
04:52:20 11 royalties of approximately \$102.8 million. And that would
04:52:26 12 be compensation for its use of the patents-in-suit during
04:52:33 13 the damage period.

04:52:35 14 MR. BUNT: Mr. Huynh, can we have the next slide?

04:52:38 15 Q. (By Mr. Bunt) At this hypothetical negotiation, remind
04:52:40 16 us how the parties would split the benefits.

04:52:43 17 A. So this is the same information, except depicted as --
04:52:47 18 as applied, it's been split. And with the pie, USAA
04:52:54 19 obtains reasonable royalties of \$102.8 million. That's
04:52:58 20 what we would call damages adequate to compensate for
04:53:04 21 infringement, from roughly August 2018 to the present.

04:53:12 22 And Wells Fargo, based on its return on equity,
04:53:13 23 would get \$15.2 million, plus, of course, it would get to
04:53:17 24 keep all those other benefits that I testified about.

04:53:19 25 MR. BUNT: The last slide, Mr. Huynh.

04:53:22 1 Q. (By Mr. Bunt) One last time, Mr. Weinstein, could you
04:53:24 2 please summarize your findings for the jury?

04:53:25 3 A. Yes. I have concluded that damages adequate to
04:53:28 4 compensate for infringement from August 2018 to the present
04:53:34 5 amount to 85 cents per deposit or approximately
04:53:39 6 \$102.8 million.

04:53:40 7 Q. And are those damages in the form of a running royalty?

04:53:43 8 A. The 85 cents per deposit would be a running royalty,
04:53:50 9 yes, sir.

04:53:50 10 Q. Thank you.

04:53:51 11 MR. BUNT: I'll pass the witness.

04:53:52 12 THE COURT: All right. Ladies and gentlemen,
04:53:53 13 before the Defendant cross-examines the Plaintiff's damages
04:53:57 14 expert, we're going to take a short recess. This will
04:53:59 15 probably be our last one for the day. If you will simply
04:54:02 16 leave your notebooks closed in your chairs, follow all the
04:54:04 17 instructions I have given you, including not to discuss the
04:54:06 18 case, and we'll be back in here shortly at which time the
04:54:09 19 Defendant will cross-examine the witness.

04:54:10 20 The jury is excused for recess.

04:54:13 21 COURT SECURITY OFFICER: All rise.

04:54:14 22 (Jury out.)

04:54:14 23 THE COURT: Let me see Mr. Sheasby and Mr. Bunt,
04:54:39 24 Mr. Melsheimer and Mr. Hill in chambers, please.

04:54:44 25 We stand in recess.

04:54:45 1 COURT SECURITY OFFICER: All rise.

04:54:45 2 (Recess.)

05:18:44 3 (Jury out.)

05:18:45 4 COURT SECURITY OFFICER: All rise.

05:18:46 5 THE COURT: Be seated, please.

05:19:21 6 All right. Mr. Hill, are you prepared to

05:19:29 7 cross-examine the witness?

05:19:30 8 MR. HILL: Yes, sir, Your Honor.

05:19:31 9 THE COURT: All right. Let's bring in the jury,

05:19:32 10 please.

05:19:33 11 COURT SECURITY OFFICER: All rise.

05:19:34 12 (Jury in.)

05:20:00 13 THE COURT: Please be seated.

05:20:01 14 All right. We'll proceed with cross-examination

05:20:04 15 of the witness by Defense counsel.

05:20:06 16 Mr. Hill, you may proceed.

05:20:08 17 MR. HILL: Thank you, Your Honor.

05:20:08 18 CROSS-EXAMINATION

05:20:09 19 BY MR. HILL:

05:20:09 20 Q. Good afternoon, Mr. Weinstein.

05:20:11 21 A. Good afternoon.

05:20:12 22 Q. Is it still afternoon or do we call this evening?

05:20:14 23 THE COURT: I get the hint, Mr. Hill. It's

05:20:20 24 afternoon.

05:20:22 25 MR. HILL: Thank you, Your Honor.

05:20:23 1 Q. (By Mr. Hill) Mr. Weinstein, I want to cover some of
05:20:25 2 the things that you talked about in your direct
05:20:28 3 examination. I want to first do some of the things that
05:20:31 4 you showed us and a couple of things that were said, and
05:20:36 5 we'll start there; are you with me, sir?

05:20:38 6 A. Yes, sir.

05:20:39 7 Q. Now, you've been in a lot of patent cases over the
05:20:41 8 years, correct?

05:20:42 9 A. I have.

05:20:42 10 Q. Seen a lot of patents?

05:20:44 11 A. I have.

05:20:44 12 Q. Patents are often invalidated, aren't they,

05:20:47 13 Mr. Weinstein?

05:20:47 14 A. They are, sir.

05:20:48 15 Q. And you've seen cases that you've worked on before
05:20:52 16 where patents have been invalidated, correct?

05:20:55 17 A. I have.

05:20:56 18 Q. And so the notion that patent rights are absolute says
05:21:00 19 a little bit too much, doesn't it?

05:21:02 20 A. No, they're absolute while they exist. And then if
05:21:08 21 they don't exist, then they don't exist.

05:21:10 22 Q. Certainly. Patents aren't inextinguishable, are they?

05:21:16 23 A. That's fair.

05:21:17 24 Q. And you were asked to do your work here today based on
05:21:22 25 a couple of assumptions, right?

05:21:25 1 A. Multiple assumptions, yes, sir.

05:21:27 2 Q. And one of the key assumptions that you as a damages
05:21:30 3 expert start with is you start with an assumption of
05:21:33 4 validity; isn't that right?

05:21:35 5 A. Yes, sir.

05:21:35 6 Q. But you don't actually assess validity yourself, do
05:21:38 7 you, sir?

05:21:39 8 A. I do not.

05:21:39 9 Q. And you start with an assumption of infringement; isn't
05:21:43 10 that right?

05:21:44 11 A. I do.

05:21:44 12 Q. And you don't actually assess the infringement
05:21:47 13 question, do you, sir?

05:21:48 14 A. That is correct.

05:21:49 15 Q. And you have no opinion on those matters; is that
05:21:52 16 correct?

05:21:52 17 A. I do not, no opinion.

05:21:54 18 Q. And if the jury ultimately decides, Mr. Weinstein, that
05:21:56 19 these patents are invalid, your economic analysis becomes
05:22:01 20 unnecessary, doesn't it, sir?

05:22:02 21 A. That is true.

05:22:03 22 Q. Now, the same goes if they find the patents aren't
05:22:08 23 infringed, the economic analysis becomes unnecessary,
05:22:11 24 agree?

05:22:11 25 A. Correct, sir.

05:22:12 1 Q. Now, Mr. Weinstein, I want to look at the timeline that
05:22:16 2 you had up earlier.

05:22:18 3 MR. HILL: I think that was PDX-4.12, Mr. Bakale.

05:22:24 4 Q. (By Mr. Hill) Do you recall your timeline, sir?

05:22:29 5 A. I do.

05:22:30 6 Q. Now, you mentioned, and I wrote it down here, about
05:22:33 7 this period, that this was a period of benefits to Wells
05:22:37 8 Fargo and so, therefore, it was time to pay up. Did I hear
05:22:41 9 that right?

05:22:41 10 A. Well, it's time to pay up beginning in August of 2018,
05:22:46 11 yes, sir.

05:22:46 12 Q. Well, so is it our fault that USAA waited 10 years to
05:22:52 13 file these patents?

05:22:53 14 A. No, I'm not suggesting that.

05:22:55 15 Q. Well, I mean, if it's time to pay up, you're not
05:22:58 16 suggesting that we owe anything for this period of time, do
05:23:01 17 you?

05:23:01 18 A. I didn't calculate that you owed anything for that time
05:23:04 19 period. There's nothing in that time period in my damages,
05:23:08 20 zero.

05:23:08 21 Q. So to the extent there was any misunderstanding from
05:23:11 22 hearing that phrase, time to pay up, that you were
05:23:14 23 suggesting somehow that during this period of time here,
05:23:19 24 before the patents issued, that there would be any damages
05:23:22 25 due under the law or any money USAA would be entitled to,

05:23:27 1 that would have been a mishearing or a mistaken notion?

05:23:30 2 A. For sure. I calculate zero damages for that period.

05:23:36 3 Q. Now, let's -- while we've got this timeline up here,

05:23:51 4 Mr. Weinstein. This is the damage period through today,

05:23:55 5 correct?

05:23:55 6 A. The -- the yellow at the right-hand side, yes, sir.

05:23:59 7 Q. But that is not under the theory that you're

05:24:02 8 calculating necessarily the end of the damage period, is

05:24:05 9 it?

05:24:05 10 A. Well, that's all I've calculated damages for, the

05:24:10 11 102 million and the 85 cents are for that period.

05:24:15 12 Q. Thank you, sir.

05:24:16 13 Now, Mr. Weinstein, I saw the total number that
05:24:24 14 you put up at the end of your work, you started with it, as
05:24:30 15 well?

05:24:30 16 MR. HILL: Can we look at PDX-4.2, please,
05:24:34 17 Mr. Bakale.

05:24:35 18 Q. (By Mr. Hill) That states the total number of
05:24:38 19 \$102 million and some change there that you calculated and
05:24:42 20 said was your opinion on what the damages should be in the
05:24:44 21 case?

05:24:45 22 A. Yes, sir.

05:24:45 23 Q. That's the only number you told the jury, correct?

05:24:50 24 A. That and the 85 cents, yes, sir.

05:24:53 25 Q. But you've actually got two opinions on damages in this

05:24:56 1 case, don't you?

05:24:57 2 A. Well, I have -- I have several calculations for various
05:25:02 3 time periods, yes, sir.

05:25:03 4 Q. Well, you -- not just for other time periods, you've
05:25:06 5 got another damage calculation for this same time period
05:25:09 6 that's at issue from the issuance of these patents in 2018
05:25:13 7 through today, don't you?

05:25:14 8 A. I could.

05:25:15 9 Q. Well, you could or you do?

05:25:17 10 A. Well, I haven't -- I haven't told the jury about any
05:25:20 11 others, but I -- I do have others in my report, yes, sir.

05:25:23 12 Q. Okay. Well, what's the other one?

05:25:24 13 A. Well, I have some damages related to fraud prevention.

05:25:28 14 Q. And what's that number?

05:25:29 15 A. My recollection is that was in the neighborhood of, I
05:25:38 16 think, 37 cents per mobile deposit. So if you did that
05:25:46 17 times 120, it would be around 40 million.

05:25:47 18 Q. You didn't show that calculation to the jury, did you?

05:25:52 19 A. Well, I wasn't asked to.

05:25:55 20 Q. Do you not believe in that calculation?

05:25:58 21 A. I absolutely believe in it.

05:26:03 22 Q. Is it reliable?

05:26:04 23 A. I think so.

05:26:05 24 Q. It's a whole lot lower than \$102 million?

05:26:10 25 A. Sure.

05:26:10 1 Q. Well, if there's nothing wrong with it and you believe
05:26:15 2 in it and you think it's reliable as an estimation in
05:26:19 3 damages in this case, were you just wanting to get the
05:26:22 4 higher number in front of the jury for USAA?

05:26:23 5 A. No, that's wrong, actually. As I testified, what I
05:26:29 6 said I think was pretty clear, that the parties would
05:26:32 7 negotiate and wind up in the middle, and USAA would not get
05:26:36 8 its super high number of 1.2 billion, nor would Wells Fargo
05:26:44 9 get its lower number associated with fraud. That was
05:26:48 10 precisely my testimony. Instead, they would wind up in the
05:26:50 11 middle.

05:26:50 12 Q. Let's talk about that \$1.2 billion number that you
05:26:54 13 mentioned. That is a calculation of what you say are the
05:26:57 14 total profits from all the benefits of MRDC, generally,
05:27:00 15 isn't it?

05:27:00 16 A. That's fair.

05:27:01 17 Q. That's not even something that you can legally make a
05:27:09 18 claim for, is it, sir?

05:27:10 19 A. Well, I -- I can't speak to that.

05:27:14 20 Q. Well, certainly you understand the law surrounding
05:27:18 21 damages, don't you?

05:27:20 22 A. To some extent, sure.

05:27:21 23 Q. And you presented no number to this jury that has --
05:27:26 24 has a damage number that has any mathematical relationship
05:27:29 25 to that 102 -- \$1.2 billion number, did you?

05:27:37 1 A. That's actually not correct.

05:27:38 2 Q. Well --

05:27:39 3 A. The damage number that I provided to the jury is
05:27:41 4 roughly 10 percent of that number.

05:27:44 5 Q. Well, sure, you can do a percentage of anything,
05:27:47 6 though, Mr. Weinstein, but you don't use that \$1.2 billion
05:27:50 7 number to figure the damages in this case, do you, sir?

05:27:52 8 A. Not specifically.

05:27:56 9 Q. And so it's an attempt to skew the damage horizon for
05:28:00 10 this jury by putting a big number in front of them, isn't
05:28:03 11 it?

05:28:03 12 A. No, sir, not at all.

05:28:05 13 Q. Certainly, a big difference between an alternative
05:28:11 14 number of \$40 million and \$100 million, right?

05:28:17 15 A. Sure.

05:28:17 16 Q. And also even a bigger difference between that and
05:28:21 17 \$1.2 billion, right?

05:28:22 18 A. Absolutely correct.

05:28:23 19 MR. HILL: Now, let's take a look at your report
05:28:25 20 at Paragraphs 181 to 182, if we can, Mr. Bakale.

05:28:32 21 Q. (By Mr. Hill) Mr. Weinstein, you prepared a report in
05:28:34 22 this case, did you not?

05:28:35 23 A. I did.

05:28:35 24 Q. And an expert report, just so our jury understands, if
05:28:40 25 you're going to testify as an expert, you have to prepare

05:28:42 1 in writing your opinions in advance and share those with
05:28:46 2 the other side; isn't that right, sir?

05:28:47 3 A. Yes, sir.

05:28:48 4 Q. And you have to explain the basis for your opinions,
05:28:50 5 and you have to completely lay out your opinions because
05:28:54 6 ultimately those are the only opinions you can sponsor as a
05:28:57 7 witness at a trial, correct, sir?

05:28:59 8 A. Absolutely correct.

05:29:00 9 Q. Now, if we look at your description at Paragraph -- and
05:29:04 10 do you have your report, Mr. Weinstein? I can bring you a
05:29:09 11 copy if you need it.

05:29:11 12 A. I do have it, yes, sir, thank you.

05:29:14 13 MR. BUNT: Your Honor, could we approach for just
05:29:15 14 a moment?

05:29:16 15 THE COURT: Approach the bench, counsel.

05:29:17 16 (Bench conference.)

05:29:24 17 MR. BUNT: Your Honor, I just wanted to flag an
05:29:26 18 issue. I have some concern about him posting up the
05:29:30 19 descriptions of the expert report because, as Your Honor
05:29:34 20 knows, that expert report still contains the older
05:29:37 21 information that was limined out by Judge Payne and by
05:29:41 22 yourself in the motion for reconsideration. I'm concerned
05:29:43 23 about him putting up old information that has been limined
05:29:48 24 out.

05:29:49 25 THE COURT: Mr. Hill?

05:29:50 1 MR. HILL: And I haven't put up old information
05:29:52 2 yet, Your Honor, and I don't plan to. We've got a type cut
05:29:57 3 intentionally of this piece of the report. It's just these
05:29:59 4 two paragraphs, which are not the old information, and
05:30:01 5 that's what I plan to show.

05:30:03 6 THE COURT: As long as it's not something that has
05:30:06 7 been addressed and covered by the Court in some way.

05:30:06 8 MR. HILL: This is not -- this is the model he
05:30:11 9 just presented. That is what I have got in front of me.

05:30:11 10 MR. BUNT: That's actually not the model they just
05:30:13 11 presented, I don't think.

05:30:14 12 MR. HILL: It's the ATM cost savings model.

05:30:16 13 MR. SHEASBY: Can we look at the paragraph so we
05:30:18 14 have no concern about it?

05:30:19 15 MR. HILL: Let me tell you where it is. It's 182.
05:30:22 16 You got his report? It's 181, 182.

05:30:26 17 MR. BUNT: Okay. That's fine.

05:30:28 18 MR. SHEASBY: That's fine. We understand.

05:30:30 19 THE COURT: All right.

05:30:31 20 MR. BUNT: Thank you, Judge.

05:30:32 21 THE COURT: All right. Let's proceed.

05:30:34 22 (Bench conference concluded.)

05:30:40 23 Q. (By Mr. Hill) Now, Mr. Weinstein, I was asking you
05:30:43 24 here about Paragraphs 181 and 182 of your report. Do you
05:30:49 25 see that, sir?

05:30:50 1 A. Yes, sir.

05:30:50 2 Q. And you describe that as an ATM deposit cost as a
05:30:50 3 measure of patented fraud prevention value. Do you see
05:30:56 4 that?

05:30:56 5 A. I do.

05:30:57 6 Q. And you describe it there in Paragraph 181 as an
05:31:02 7 alternative approach to damages.

05:31:04 8 A. I do.

05:31:05 9 Q. And the other -- what it's an alternative to is the
05:31:13 10 lower number we talked about a minute ago, isn't it?

05:31:15 11 A. In -- in the context of fraud, yes.

05:31:18 12 Q. And you say: Given that ATM deposit systems adequately
05:31:23 13 address fraud, I have analyzed cost associated with ATM
05:31:32 14 deposits to value fraud loss prevented by the patented
05:31:37 15 functionality. And you've calculated the difference
05:31:40 16 between ATM deposit costs and MRDC deposit costs, correct?

05:31:44 17 A. Yes, sir.

05:31:46 18 Q. All right. Let me take my mark here.

05:32:07 19 Now, you say in the next paragraph -- we'll just
05:32:11 20 read them in full -- I have used the total cost of each
05:32:15 21 system because ATM is the least expensive deposit channel
05:32:18 22 available to Wells Fargo, other than MRDC, but does not
05:32:22 23 make use of the MRDC fraud prevention techniques nor the
05:32:29 24 MRDC techniques itself which involves a mobile device and
05:32:34 25 no access to the physical check by the bank.

05:32:42 1 Did I read that correctly, Mr. Weinstein?

05:32:42 2 A. You did.

05:32:42 3 Q. All right. So here, you say that ATM does not make use
05:32:48 4 of the MRDC fraud prevention techniques. You see that?

05:32:54 5 A. I do.

05:32:54 6 Q. Okay. So I want to know, what techniques are you
05:32:57 7 talking about?

05:32:57 8 A. Talking about the techniques that allow a consumer to
05:33:04 9 make a deposit using a consumer device rather than a device
05:33:10 10 where the environment is controlled by the bank, such as
05:33:14 11 the case with specialized scanners or ATMs.

05:33:19 12 Instead, with the case of MRDC, we're talking
05:33:22 13 about using a consumer device to -- to make the deposit.
05:33:30 14 And we know from the documents that I cited in my -- in my
05:33:38 15 testimony that Wells Fargo was tremendously concerned about
05:33:43 16 fraud risks associated with using those devices which it
05:33:47 17 did not control.

05:33:50 18 Q. Now, Mr. Weinstein, so let me make sure I'm hearing you
05:33:56 19 correctly. You're saying that the use of a consumer device
05:34:00 20 is a fraud -- a fraud prevention technique?

05:34:05 21 A. No, no. I'm saying the fraud prevention techniques
05:34:09 22 associated with the use of a consumer device --

05:34:12 23 Q. All right.

05:34:13 24 A. -- are -- are different from the fraud prevention
05:34:17 25 techniques that previously had been used.

05:34:19 1 Q. And that's what I want to understand. I want to know
05:34:21 2 what those different fraud protection techniques are.

05:34:23 3 A. Well, for the first time, with the consumer device, you
05:34:27 4 had to be able to get a useable data to the bank from a
05:34:35 5 device that -- that Wells Fargo did not control. And as a
05:34:39 6 consequence, they were very concerned about how to -- how
05:34:45 7 to do that and provide adequate real-time information so
05:34:49 8 that that device -- that deposit could be -- could be
05:34:56 9 effected -- could be completed.

05:34:59 10 And it was necessary to have a new set of -- of
05:35:06 11 techniques available in order to complete those kinds of
05:35:11 12 deposits. That's -- that's absolutely clear from the
05:35:13 13 planning documents.

05:35:14 14 Q. Okay. And that's -- again, what I'm trying to hear,
05:35:17 15 Mr. Weinstein, is I want to hear what those fraud
05:35:20 16 prevention techniques are.

05:35:22 17 A. Well, the fraud prevention techniques related to
05:35:29 18 providing information like the identity of the -- of the
05:35:35 19 person writing the check and the amount and the information
05:35:42 20 about the account and the bank routing number at the bottom
05:35:45 21 in ways that were going to be sufficiently adequate for the
05:35:50 22 bank to process that check when, in the past, the bank
05:35:54 23 actually had control of the check.

05:35:57 24 And so something new had to be developed to allow
05:35:59 25 the bank to do that, which did not exist before.

05:36:06 1 Q. Mr. Weinstein -- and I don't mean to -- to seem
05:36:11 2 difficult, but I -- that's something more than I'm after.

05:36:14 3 You say something more had to be done to ensure these
05:36:18 4 things, and I'm not hearing what that something more is.

05:36:20 5 A. Well, the thing is this, I'm an economist. I'm not a
05:36:23 6 technical expert. And so what I've been talking about is a
05:36:28 7 result of my examination of the documents about which I
05:36:33 8 testified, which made it clear that there were new fraud
05:36:39 9 risks associated with mobile deposits that had not existed
05:36:43 10 in the past because the bank controlled the environment
05:36:45 11 from which the check came, and the bank had possession of
05:36:49 12 the check.

05:36:50 13 And before MRDC was implemented, there was
05:36:55 14 tremendous concern about those risks. And the point of --
05:36:58 15 of my testimony as an economist is that they were able to
05:37:05 16 overcome those risks, something they were concerned that
05:37:07 17 they couldn't do, but they were able to overcome those
05:37:10 18 risks and actually implement MRDC. And found in the end
05:37:14 19 that it was actually at least as safe as ATMs had been.

05:37:19 20 So there had to have been something more. Now, I
05:37:23 21 can't tell you what that is exactly because I'm not an
05:37:25 22 engineer, but I approach it as an economist and I look at
05:37:29 23 what happened, their concern, and the results.

05:37:30 24 Q. Okay. So, Mr. Weinstein, are -- you're saying that
05:37:35 25 you've been told by technical folks or in technical

05:37:38 1 material you've looked at, that there are fraud prevention
05:37:42 2 techniques -- patented fraud prevention techniques, and you
05:37:51 3 accounted for those, but you can't tell me what they are?
05:37:51 4 A. Well, I -- surely, I have been told about that, yes,
05:37:55 5 from technical people. But as I've tried to explain, as an
05:38:00 6 economist, I can see that that was the problem and it was
05:38:03 7 overcome.
05:38:04 8 Q. Mr. Weinstein, do ATMs do duplicate deposit checking?
05:38:08 9 A. Yes, sir. Not by themselves, but yes.
05:38:15 10 Q. That's part --
05:38:17 11 A. At the end of the game, yes.
05:38:18 12 Q. That's part of the ATM system, correct?
05:38:21 13 A. Yes, sir.
05:38:21 14 Q. All right. Do ATMs do endorsement verification?
05:38:24 15 A. That's my understanding.
05:38:25 16 Q. And let me make sure I'm clear about that. ATMs today
05:38:31 17 are also image-based devices, aren't they, sir?
05:38:34 18 A. As far as I know, yes, sir.
05:38:37 19 Q. And do ATMs do customer authentication?
05:38:39 20 A. I believe so.
05:38:40 21 Q. And do ATMs take a good picture of the check?
05:38:43 22 A. Yes.
05:38:44 23 Q. And do ATMs do OCR?
05:38:50 24 A. Yes.
05:38:50 25 Q. And do ATMs do amount verification?

05:38:50 1 A. Yes.

05:38:50 2 Q. And do ATMs do MICR verification?

05:38:55 3 A. Yes.

05:38:55 4 Q. And the duplicate detection that the ATMs do, they do

05:39:02 5 it by using the comparison of the MICR line to other

05:39:05 6 information on the check, don't they, sir?

05:39:09 7 A. I believe so.

05:39:10 8 Q. And ATMs have done all those things for -- long before

05:39:15 9 these patents, right?

05:39:16 10 A. Correct.

05:39:16 11 Q. In fact, ATMs have done all of those things since even

05:39:22 12 before -- since probably the early 2000s, right?

05:39:26 13 A. I believe so.

05:39:26 14 Q. And yet what you say here is, Mr. Weinstein, in your

05:39:34 15 report at Paragraph 182, is you say that ATM does not make

05:39:42 16 use of the MRDC fraud prevention techniques which involve a

05:39:51 17 mobile device.

05:39:55 18 And so what I'm trying -- and that's what you

05:39:59 19 valued, right?

05:39:59 20 A. That is -- that is in part what I value, yes, sir.

05:40:01 21 Q. And what I'm trying to do, Mr. Weinstein, is put our

05:40:07 22 finger on what you valued that is any different than what

05:40:09 23 existed in that ATM network. Can you -- can you tell us

05:40:13 24 that?

05:40:13 25 A. I believe I have, but, yes, what I valued is the

05:40:21 1 ability of the patents to provide a system that solved the
05:40:27 2 problem that Wells Fargo was concerned about in all of
05:40:30 3 those planning documents before it implemented MRDC. And
05:40:34 4 that concern was fraud associated with duplicates. And the
05:40:40 5 reason that was such a great concern is that for the first
05:40:43 6 time, the consumer kept the check.

05:40:46 7 And, as I said, I'm not a technical expert, so I
05:40:49 8 can't explain exactly how all of this was accomplished.
05:40:56 9 But what I can say as an economist is that there was a
05:40:59 10 problem, the problem had to do with -- with avoiding fraud
05:41:02 11 associated with duplicates. That was a much greater
05:41:06 12 problem than had existed in the past. We heard that from
05:41:11 13 Mr. Brady. And that somehow the patents solved that
05:41:13 14 problem because Wells Fargo ultimately, after all those
05:41:19 15 concerns, made the decision to go ahead and implement MRDC.

05:41:24 16 And it turns out both from Mr. Ajami and from the
05:41:28 17 USAA data, those bar charts that we looked at, that MRDC
05:41:32 18 actually turns out to be at least as safe and in some cases
05:41:39 19 clearly safer than -- than ATMs.

05:41:41 20 Q. Mr. Weinstein, let's look at PDX-4.11, please. You
05:42:01 21 talked about the hypothetical negotiation during the
05:42:01 22 context of your testimony, correct?

05:42:01 23 A. Yes, sir.

05:42:01 24 Q. And you put this slide up. And I want to talk to you
05:42:06 25 about this a little bit. The hypothetical negotiation is

05:42:08 1 this hypothetical construct that you use to -- to calculate
05:42:12 2 patent damages, isn't it?

05:42:13 3 A. Correct.

05:42:14 4 Q. And what we imagine in this hypothetical negotiation,
05:42:17 5 Mr. Weinstein, is we imagine that, before the infringement
05:42:21 6 started -- so before these patents issued or at the time of
05:42:25 7 that, at the time of first infringement, which would have
05:42:27 8 been the issue date of these patents, that Wells Fargo and
05:42:31 9 USAA sat down in a room and they negotiated a patent
05:42:36 10 license, right?

05:42:36 11 A. That's -- that's precisely what I'm trying to depict
05:42:40 12 here, yes, sir.

05:42:40 13 Q. Okay. And they sit in that room and they negotiate
05:42:44 14 that patent license with the benefit of something we call
05:42:46 15 the book of knowledge, right?

05:42:47 16 A. Yes, sir.

05:42:48 17 Q. And what it means is, we assume -- of course, this
05:42:53 18 doesn't happen, so we have to assume it happened, but we
05:42:56 19 assume if it happened, they would sit in that room, and
05:42:59 20 they would have the benefit of all the information?

05:43:04 21 A. They would.

05:43:04 22 Q. That's that book of -- book of wisdom, right?

05:43:07 23 A. Correct, sir.

05:43:08 24 Q. And one of the things in that room, Mr. Weinstein, that
05:43:12 25 Wells Fargo is certainly going to know is they're going to

05:43:15 1 know what they already own, aren't they, sir?

05:43:17 2 A. Yes, sir.

05:43:18 3 Q. They're going to know what they've already used in

05:43:23 4 deployed deposit systems like ATM networks, aren't they,

05:43:26 5 sir?

05:43:26 6 A. I agree.

05:43:27 7 Q. And they're not going to agree to pay value for things

05:43:30 8 they've had for decades?

05:43:32 9 A. I agree with that.

05:43:33 10 Q. Now, you're an economist and not a technical expert,

05:43:40 11 right?

05:43:40 12 A. Yes, sir.

05:43:40 13 Q. And you don't have any banking experience, right?

05:43:42 14 A. I don't.

05:43:43 15 Q. You didn't do a technical analysis of the patents?

05:43:45 16 A. Correct.

05:43:47 17 Q. You didn't look at the patents and do an analysis of

05:43:50 18 which features or which portions of it are different from

05:43:58 19 prior art, did you?

05:43:58 20 A. I did not, that's correct.

05:44:00 21 Q. You didn't look at old fraud prevention methods, did

05:44:05 22 you?

05:44:05 23 A. That's true. That's fair.

05:44:09 24 Q. And you didn't compare any alleged fraud prevention

05:44:12 25 methods in the patents to any fraud prevention methods that

05:44:17 1 would have existed in previous systems, did you, sir?

05:44:19 2 A. Well, that's not quite correct because we -- we did

05:44:24 3 look at that bar chart that shows the difference in

05:44:27 4 performance between mobile and ATMs. But beyond that, the

05:44:32 5 answer is, that's correct.

05:44:33 6 Q. Well, that's certainly not a -- a technical comparison

05:44:37 7 of technology involved in old systems and the technology

05:44:40 8 involved in MRDC for fraud prevention?

05:44:41 9 A. Sure. But it's the kind of comparison that I make as

05:44:45 10 an economist.

05:44:46 11 Q. And, Mr. Weinstein, the value that you assign to these

05:45:03 12 patents in this case is based on your understanding that

05:45:05 13 the patents invented a new duplicate detection method; is

05:45:10 14 that right?

05:45:10 15 A. I'm fine with that, yes, sir.

05:45:11 16 Q. And that's a fraud prevention method, right?

05:45:16 17 A. It is.

05:45:16 18 Q. Let's talk about -- what would -- what do you value in

05:45:30 19 a patent, let me ask that?

05:45:32 20 A. You value the incremental contribution associated with

05:45:37 21 the patent.

05:45:38 22 Q. Okay. The incremental contribution associated with the

05:45:40 23 invention in the patent?

05:45:41 24 A. Yes, sir, and what -- you value what's -- what's new

05:45:45 25 about the patent that didn't exist before.

05:45:46 1 Q. Well, and when you do that to know what is new about
05:45:54 2 the patents, you have to know something about the patent
05:45:56 3 claims, right?

05:45:59 4 A. Well, yes, you do.

05:46:01 5 Q. Okay. The value of the patent is set forth -- is what
05:46:05 6 is set forth in the claims, right?

05:46:08 7 A. Well, the claims describe the property that's being --
05:46:15 8 that's being protected. The value associated with those
05:46:18 9 claims is something that a person like myself, you know, is
05:46:23 10 trained to try and measure, but the claims define the
05:46:25 11 property right.

05:46:26 12 Q. And you -- you -- I thank you, Mr. Weinstein. I asked
05:46:29 13 a poor question.

05:46:30 14 The claims, the definition of the property
05:46:33 15 boundary, that's in the claims?

05:46:37 16 A. Yes, sir.

05:46:37 17 Q. And the only part of a patent, that a property owner, a
05:46:40 18 patent owner, has the right to try to enforce against
05:46:43 19 anybody is what's in the claims, right?

05:46:45 20 A. That's my understanding, yes, sir.

05:46:46 21 Q. And -- I'm sorry, sir, I didn't mean to talk over you.

05:46:48 22 And so you can have information in your
05:46:54 23 specification, but if you don't put that in the claims,
05:46:57 24 that's not part of your invention, is it?

05:46:59 25 A. My understanding is it's the claims that -- that govern

05:47:05 1 the property rights, not the specification.

05:47:08 2 Q. And, Mr. Weinstein, if you don't claim it in the

05:47:12 3 claims, a damages expert like yourself can't attribute

05:47:15 4 value to it, can you?

05:47:17 5 A. Typically, I would not, that's correct, yes, sir.

05:47:19 6 Q. And so if these patents claim new methods of duplicate

05:47:23 7 detection, we have to look for that in the claims, don't

05:47:27 8 we?

05:47:27 9 A. We have to look at the property rights in the claims,

05:47:33 10 that is true.

05:47:34 11 Q. And --

05:47:35 12 A. And if we're talking about duplicate detection, that's

05:47:37 13 where we'd look.

05:47:37 14 Q. And for you to assign value based on the invention of

05:47:40 15 new methods of duplicate detection, those new methods have

05:47:44 16 to be embodied in the claims, don't they, sir?

05:47:46 17 A. That's fair.

05:47:48 18 Q. Well, let's look at one of these patents,

05:47:52 19 Mr. Weinstein.

05:47:55 20 MR. HILL: Can we look at -- we'll pick the '681

05:48:01 21 patent this time. Mr. Bakale, can we get the '681 patent

05:48:04 22 on the screen, please.

05:48:08 23 Q. (By Mr. Hill) And if we look at Claim 22 of the '681

05:48:23 24 patent. Do you have the patents with you, Mr. Weinstein?

05:48:26 25 A. Is there an exhibit number?

05:48:27 1 Q. I'm not sure about it. Let me check. I don't believe
05:48:42 2 you do. Let -- let me get you a copy, Mr. Weinstein.

05:49:17 3 MR. HILL: Your Honor, I apologize for the delay.

05:49:21 4 THE COURT: Mr. Hill, I happen to have an extra
05:49:21 5 copy of both patents up here. Would you like me to hand
05:49:25 6 them to the witness?

05:49:25 7 MR. HILL: Your Honor, that is very user friendly.
05:49:28 8 I much appreciate that.

05:49:29 9 THE WITNESS: Thank you, sir.

05:49:32 10 MR. HILL: And I apologize for not having them at
05:49:34 11 the ready, Judge.

05:49:34 12 THE COURT: All right. He's got them now. Let's
05:49:36 13 proceed.

05:49:36 14 MR. HILL: Thank you.

05:49:37 15 Q. (By Mr. Hill) Mr. Weinstein, I'm looking at Claim 22
05:49:41 16 of the '681 patent. It appears in Column 16.

05:49:49 17 A. I have it. Thank you.

05:49:52 18 Q. Okay. And it says: The system of Claim 12 -- now,
05:49:57 19 this is a dependent claim, right?

05:49:59 20 A. Yes, sir.

05:49:59 21 Q. And so that means you've got to satisfy all the steps
05:50:03 22 in 12, and then you've got to satisfy this additional step
05:50:07 23 in 22.

05:50:09 24 The system of Claim 12, wherein the confirming
05:50:12 25 step takes place after duplicate detection is performed on

05:50:15 1 the check.

05:50:15 2 Do you see that?

05:50:20 3 A. I do.

05:50:21 4 Q. That mentions duplicate detection, doesn't it?

05:50:27 5 A. It does.

05:50:27 6 Q. Do the claims describe it in any more detail than that?

05:50:31 7 A. I think that's the only place in the claims where the
05:50:34 8 words duplicate detection appears.

05:50:35 9 Q. It just states that duplicate detection is performed,
05:50:40 10 correct?

05:50:40 11 A. Well, it states a little more than that, but, yes.

05:50:44 12 Q. It doesn't specify the method of doing duplicate
05:50:48 13 detection, does it?

05:50:48 14 A. That's true.

05:50:49 15 Q. The claim doesn't specify any new way of doing
05:50:53 16 duplicate detection, does it, sir?

05:50:54 17 A. No, it just says what you've read.

05:51:02 18 Q. And this is true for all the asserted claims that
05:51:05 19 mention duplicate detection, isn't it, Mr. Weinstein?

05:51:08 20 A. I think that's correct, yes, sir.

05:51:11 21 Q. None of those claims specify a type of duplicate
05:51:14 22 detection, do they, sir?

05:51:20 23 A. They're -- they are limited to what you read, that's
05:51:25 24 true.

05:51:26 25 Q. Now, Mr. Weinstein, as part of your valuation analysis

05:52:01 1 to assign value to these patented fraud prevention
05:52:06 2 techniques, you also believed that the patents invented a
05:52:11 3 new method of performing amount verification, didn't you?
05:52:14 4 A. Yes.
05:52:15 5 Q. That's a fraud prevention feature, isn't it?
05:52:21 6 A. It is, it contributes, yes.
05:52:22 7 Q. And you believe that these patents created a new method
05:52:26 8 of routing number validation, correct?
05:52:29 9 A. Also true.
05:52:30 10 Q. And you believe that these patents created a new method
05:52:33 11 of checking for the endorsement?
05:52:37 12 A. I agree, yes, sir.
05:52:38 13 Q. How do you check for the endorsement on a check?
05:52:42 14 A. You read it and -- and you compare it with other
05:52:46 15 information that you've had.
05:52:47 16 Q. So you turn it over, right?
05:52:49 17 A. Yeah.
05:52:50 18 Q. And it's either endorsed or it's not, fair?
05:52:53 19 A. Sure.
05:52:59 20 Q. You also stated that you -- your belief that these
05:53:02 21 patents created a new method of customer identification --
05:53:05 22 or, excuse me, customer authentication?
05:53:08 23 A. Yes, sir.
05:53:12 24 Q. And, Mr. Weinstein, you agree that if there were
05:53:15 25 pre-existing fraud prevention benefits, you would need to

05:53:19 1 apportion the value of the incremental improvement,
05:53:22 2 wouldn't you?

05:53:22 3 A. If there were pre-existing benefits associated with the
05:53:28 4 things that you identified, you would need to apportion for
05:53:34 5 those benefits, yes.

05:53:36 6 Q. And all of those things I just identified are in that
05:53:39 7 ATM network, aren't they, Mr. Weinstein?

05:53:41 8 A. They are.

05:53:45 9 Q. Now, Mr. Weinstein, in your slides earlier, another
05:54:13 10 thing I noticed that I'll -- is your reference to some
05:54:19 11 comments about Wells Fargo losing 97 percent of its
05:54:23 12 customers. Do you recall that?

05:54:24 13 A. I do.

05:54:26 14 MR. HILL: Can we look at PDX-38, please,
05:54:38 15 Mr. Bakale?

05:54:41 16 Q. (By Mr. Hill) Do you remember this slide?

05:54:42 17 A. Yes, sir.

05:54:44 18 Q. And it shows here that Wells Fargo is going to lose all
05:54:49 19 this -- all these deposits, all these customers. Presented
05:54:57 20 that on direct?

05:54:57 21 A. Yes, we're talking about profits, but that's correct,
05:55:01 22 yes, sir.

05:55:01 23 Q. And if we go to the previous slide, the slide right
05:55:04 24 before that, we see how you did the math there, but this
05:55:09 25 slide tells us a little more about what you were actually

05:55:13 1 looking at. This says USAA experienced 3 percent of
05:55:22 2 digital customers accepted desktop solutions, right?

05:55:28 3 A. Yes, sir.

05:55:29 4 Q. So that 3 percent number comes from USAA's experience
05:55:32 5 with its scanner-based application, correct?

05:55:35 6 A. It does, yes.

05:55:40 7 Q. And --

05:55:42 8 MR. HILL: If we can go back to the previous
05:55:45 9 slide.

05:55:48 10 Q. (By Mr. Hill) You then use that 3 percent from USAA to
05:55:53 11 project what would happen at Wells Fargo, right?

05:55:56 12 A. Did you say I didn't?

05:55:59 13 Q. You did? You did?

05:56:01 14 A. I did, yes.

05:56:02 15 Q. Well, let's talk about the differences between USAA and
05:56:04 16 Wells Fargo, okay?

05:56:05 17 A. Sure.

05:56:05 18 Q. USAA doesn't have any branches except for one in San
05:56:10 19 Antonio, right?

05:56:11 20 A. Correct.

05:56:12 21 Q. USAA doesn't have a thorough distribution of ATMs
05:56:19 22 around the country for its consumers to use, does it?

05:56:21 23 A. That's correct.

05:56:22 24 Q. I mean, do you know how many they have at all?

05:56:26 25 A. They have -- they have relatively few. I knew that

05:56:30 1 number at one time. It's relatively few.

05:56:32 2 Q. So if you're USAA and you're a USAA customer, how do
05:56:39 3 you -- before this MRDC, how do you get checks to the bank?

05:56:43 4 A. You use ATMs.

05:56:46 5 Q. Well, they don't have any ATMs.

05:56:47 6 A. Excuse me, you use somebody else's ATMs.

05:56:50 7 Q. So you think somebody else's ATMs would accept deposits
05:56:54 8 for USAA customers?

05:56:56 9 A. If -- if -- if that's part of the arrangement, sure.

05:56:59 10 Q. Okay. Well, how else would you get it there?

05:57:02 11 A. They -- they'd either be direct deposited.

05:57:07 12 Q. Well, that doesn't have anything to do with -- with RDC
05:57:11 13 or MRDC.

05:57:11 14 A. I fully understand that.

05:57:13 15 Q. Okay. Well, how, if I'm a USAA customer before the
05:57:18 16 launch of this, how did I get my money to the bank?

05:57:20 17 A. You could either use a scanner or have it direct
05:57:28 18 deposited. That was -- those are basically the ways to do
05:57:30 19 it.

05:57:31 20 Q. What choices did the USAA folk -- could they mail it
05:57:34 21 in?

05:57:34 22 A. Excuse me?

05:57:35 23 Q. Could they mail it in?

05:57:37 24 A. I don't know.

05:57:37 25 Q. Could they do mail deposits you think before they had

05:57:41 1 this other technology?

05:57:41 2 A. I would think so, but I don't know.

05:57:44 3 Q. And so if you're USAA and you have no other way for
05:57:49 4 your customers to get money to you and you look at a
05:57:57 5 situation where they can't use your mobile device, it makes
05:57:59 6 sense why you might lose 97 percent of your customers,
05:58:05 7 doesn't it?

05:58:06 8 A. Sure does.

05:58:07 9 Q. But if you're Wells Fargo and you have 5,500 branches
05:58:13 10 nationwide and 13,000 ATMs and business specialty devices
05:58:19 11 to accept business checks, if you can't do MRDC, if you
05:58:27 12 don't offer MRDC, it's not going to have the same impact,
05:58:31 13 is it?

05:58:31 14 A. No, you're wrong, sir. It was table stakes.

05:58:34 15 Q. Well, if I've got -- Wells Fargo's got a branch within
05:58:39 16 five miles of almost everybody in America; did you know
05:58:41 17 that?

05:58:41 18 A. Wouldn't surprise me.

05:58:44 19 Q. They've got ATMs, 13,000 of them, biggest ATM fleet in
05:58:48 20 the country; do you realize that?

05:58:51 21 A. Wouldn't surprise me.

05:58:53 22 Q. And that's all hard investment that Wells Fargo has
05:58:56 23 made to serve its customers' needs that USAA didn't make,
05:59:00 24 right?

05:59:00 25 A. Sure.

05:59:01 1 Q. Just different business choices, true?

05:59:04 2 A. Correct.

05:59:06 3 Q. And those different business choices impact on the
05:59:11 4 effect of MRDC availability, doesn't it, sir?

05:59:17 5 A. Not if it's table stakes.

05:59:23 6 Q. Well, it's certainly hard to say that a comparison of a
05:59:28 7 bank with no branches to a comparison of a bank with the
05:59:31 8 biggest branch and ATM distribution across the country
05:59:37 9 might not be apples-to-apples. You agree to that?

05:59:40 10 A. I -- I do agree to that, but that was not the only
05:59:43 11 comparison.

05:59:43 12 Q. Now, Mr. Weinstein, you analyzed licensing issues as
05:59:52 13 part of your work, correct?

05:59:53 14 A. Yes, sir.

05:59:54 15 Q. There are no licenses to the USAA patents in this case,
06:00:01 16 correct?

06:00:01 17 A. Correct.

06:00:04 18 Q. Also, USAA doesn't provide MRDC products or services to
06:00:09 19 other banks, correct?

06:00:12 20 A. Correct.

06:00:13 21 Q. If Wells Fargo or any other bank wants to offer mobile
06:00:18 22 deposit to their customers, they have to build it or hire
06:00:23 23 somebody to build it for them, don't they?

06:00:26 24 A. Yes, sir.

06:00:27 25 Q. USAA doesn't offer some MRDC product or service that

06:00:31 1 another bank can buy to avoid building their own systems,
06:00:36 2 right?

06:00:36 3 A. Correct.

06:00:37 4 Q. And, at most, a license to USAA's patents, like you
06:00:44 5 would consider in the hypothetical negotiation analysis,
06:00:48 6 that's just a per -- permission slip, isn't it?

06:00:53 7 A. Yes, sir.

06:00:53 8 Q. It doesn't give you anything else, does it?

06:00:55 9 A. Does not.

06:00:56 10 Q. It's what economists like to call a bare patent
06:01:02 11 license?

06:01:02 12 A. That's what it is.

06:01:06 13 Q. And it doesn't give you any technology assistance,
06:01:06 14 right?

06:01:06 15 A. Correct.

06:01:07 16 Q. And it doesn't give you any access to back end systems,
06:01:09 17 does it?

06:01:09 18 A. It does not.

06:01:10 19 Q. And it doesn't give you any other products or services?

06:01:17 20 A. Correct.

06:01:17 21 Q. So any value of those things, how you actually build
06:01:23 22 and distribute an MRDC system, a value of just that bare
06:01:31 23 patent license can't include any of those things, can it?

06:01:35 24 A. That's correct.

06:01:36 25 Q. Now, you mentioned the Zelle -- the Zelle agreement

06:01:44 1 that USAA has. That Zelle agreement USAA has is not a
06:01:47 2 patent license, is it?

06:01:48 3 A. Correct.

06:01:49 4 Q. It's an actual service?

06:01:52 5 A. It is.

06:01:52 6 Q. That they buy?

06:01:53 7 A. Yes, sir.

06:01:54 8 Q. And they pay for?

06:01:55 9 A. They do.

06:01:56 10 Q. And by buying it and paying for it, they actually get
06:02:00 11 access to a system that their customers can then use to
06:02:04 12 move money from each other, right?

06:02:05 13 A. That's fair.

06:02:06 14 Q. It's kind of like Venmo, right?

06:02:09 15 A. Yes.

06:02:09 16 Q. All right. Now, Mr. Weinstein, I want to wrap up with
06:02:21 17 just a couple of questions about your engagement on this
06:02:25 18 case, okay?

06:02:26 19 You're -- you provided us with a resume in
06:02:30 20 connection with this work, right?

06:02:31 21 A. I did.

06:02:31 22 Q. And you were required to list prior engagements as an
06:02:36 23 expert witness, correct?

06:02:36 24 A. Yes, sir.

06:02:38 25 Q. And you listed 28 cases within the last four years that

06:02:44 1 I counted; is that right?

06:02:45 2 A. That sounds right.

06:02:46 3 Q. All right. And only one time in those four years have
06:02:49 4 you testified for a Defendant; isn't that right?

06:02:50 5 A. Correct.

06:02:51 6 Q. Every other time you were testifying for the Plaintiff
06:02:54 7 like you're doing in this case for USAA, right?

06:02:56 8 A. Yes, sir.

06:02:57 9 Q. And that's usually the party that's asking for money,
06:03:00 10 correct, sir?

06:03:00 11 A. Yes.

06:03:01 12 Q. Just like here for USAA?

06:03:03 13 A. Correct.

06:03:08 14 Q. And you haven't done this engagement for charity, have
06:03:11 15 you, Mr. Weinstein?

06:03:14 16 A. Well, you know, I'm an employee, but --

06:03:17 17 Q. Sure.

06:03:18 18 A. So I'm paid -- I'm paid by my company, but that has
06:03:21 19 nothing to do with this.

06:03:22 20 Q. Well, you've been paid by USAA for your work, correct?

06:03:27 21 A. No, I haven't. My company gets paid.

06:03:29 22 Q. All right. And how much will your company ultimately
06:03:31 23 be paid for this engagement?

06:03:33 24 A. It would be many hundreds of thousands of dollars,
06:03:36 25 probably -- I'm going to say 350 to \$400,000.00.

06:03:43 1 MR. HILL: Thank you, Your Honor. I'll pass the
06:03:45 2 witness.

06:03:45 3 THE COURT: All right. Is there redirect,
06:03:46 4 Mr. Bunt?

06:03:47 5 MR. BUNT: Yes, Your Honor.

06:03:48 6 THE COURT: Please proceed.

06:03:48 7 REDIRECT EXAMINATION

06:03:49 8 BY MR. BUNT:

06:03:49 9 Q. Mr. Weinstein, let's start back with where Mr. Hill
06:03:57 10 left off. Have you worked for companies that are both
06:04:03 11 Plaintiffs and Defendants in lawsuits in your career?

06:04:06 12 A. Yes. I mean, as I said at the outset, I've been doing
06:04:10 13 this for 50 years. And over that time, I've worked for
06:04:14 14 both and Plaintiffs and Defendants. It is true that in the
06:04:17 15 more recent years I -- I tended to be retained more often
06:04:21 16 by Plaintiffs.

06:04:22 17 Q. Have you also consulted with companies that are not
06:04:25 18 involved in litigation at all?

06:04:26 19 A. Yes, I do that.

06:04:28 20 Q. And there was a question about your fees. Again, are
06:04:35 21 all the technical and damage experts in this case being
06:04:40 22 paid for their time?

06:04:43 23 A. As far as I know, all of the experts in the case are
06:04:48 24 either paid for their time or their companies are paid for
06:04:51 25 their time, which is true in my situation.

06:04:53 1 Q. So your counterpart, Mr. Gerardi, Wells Fargo's damage
06:04:58 2 expert, is likely being paid for his time, as well?

06:05:01 3 A. Yes, sir.

06:05:01 4 Q. And while we're talking about Mr. Gerardi, he starts
06:05:06 5 with the same assumptions that you do, correct?

06:05:10 6 A. Yes. He -- he and I agree on the framework here,
06:05:16 7 namely, we agree that -- the way to answer the question as
06:05:18 8 to -- as to what fair payment for permission would be is
06:05:23 9 through a hypothetical negotiation between the parties at
06:05:25 10 around the time of first infringement, assuming the patents
06:05:29 11 are valid, infringed, and enforceable, and that the parties
06:05:35 12 have access to information about the -- the patents
06:05:39 13 themselves.

06:05:40 14 Q. You're not here to testify about infringement or
06:05:42 15 validity, and Mr. Gerardi will not be testifying about
06:05:46 16 those aspects either, correct?

06:05:47 17 A. Correct.

06:05:47 18 Q. As a damage expert, though, can you generally explain
06:05:51 19 why you think the patents in this suit teach new fraud and
06:06:00 20 duplicate detection techniques?

06:06:02 21 A. Yes. And I approach it as an economist, not as a
06:06:06 22 technical expert. But when I looked at the Wells Fargo
06:06:09 23 planning documents, some of which we used in connection
06:06:14 24 with my testimony --

06:06:16 25 MR. BUNT: Mr. Huynh -- let me just stop you,

06:06:18 1 Mr. Weinstein. Would you pull up Slide 37 from

06:06:22 2 Mr. Weinstein's direct examination slides?

06:06:24 3 A. When I -- when I looked at those planning documents,
06:06:28 4 what I observed is that, in my view -- and I wasn't there
06:06:33 5 at the time -- but, in my view, the primary concern that
06:06:37 6 Wells Fargo had in connection with launching MRDC was this
06:06:44 7 threat of duplicate deposits, primarily because for the
06:06:49 8 first time the consumer would keep the check, and that was
06:06:53 9 not something that had been experienced before.

06:06:55 10 Instead of turning the check over or depositing it
06:06:59 11 through a controlled environment -- namely, an ATM or a
06:07:02 12 specialized scanner -- the consumer had the check. And
06:07:06 13 that was a real tremendous concern for Wells -- Wells Fargo
06:07:10 14 and also for USAA.

06:07:14 15 And as an economist, I say, all right, they were
06:07:17 16 concerned about duplicates. Ultimately, they launched it,
06:07:23 17 which meant they had to have been able to get past those
06:07:29 18 concerns. And what we find is that, in fact -- in fact,
06:07:33 19 mobile deposits turn out to be even safer than ATMs in
06:07:37 20 terms of fraud.

06:07:39 21 Q. Mr. Hill mentioned the fact that these ATMs had all
06:07:45 22 these duplicate detection devices and other fraud detection
06:07:50 23 features. Do you agree with that?

06:07:52 24 A. Well, they had -- they had their own fraud prevention
06:07:54 25 features, to be sure, so that the deposited check could be

06:07:57 1 credited to the consumer's account. There's no question
06:08:00 2 that those features existed. But this was a new kind of
06:08:04 3 threat that required new kinds of -- new kinds of defect --
06:08:09 4 detection features in order to address fraud and -- and --
06:08:16 5 and keep it at -- at maintainable levels, which is exactly
06:08:21 6 what the patents did.

06:08:22 7 Q. Looking at this slide in front of us, if ATMs had these
06:08:28 8 old fraud detection services and those old fraud detection
06:08:33 9 services were still available, why would Wells Fargo be
06:08:39 10 writing that it needed -- that it was concerned about this
06:08:41 11 threat of MRDC with duplicate deposits if it had the old
06:08:48 12 system available to it?

06:08:49 13 MR. HILL: Objection, Your Honor, calls for
06:08:51 14 speculation.

06:08:51 15 MR. BUNT: It's the same thing he's been
06:08:53 16 testifying about.

06:08:53 17 THE COURT: He's an expert witness. He can offer
06:08:58 18 opinion. I'll overrule the objection.

06:08:59 19 A. If -- if Wells Fargo already had these fraud detection
06:09:03 20 features, you wouldn't see this kind of language about the
06:09:05 21 primary threat of MRDC being duplicate deposits in -- in
06:09:09 22 their planning documents. If they already had fraud
06:09:12 23 detection that would work for MRDC, that would not have
06:09:16 24 been the concern. That was a tremendous concern.

06:09:25 25 Q. (By Mr. Bunt) Were the cost savings benefits the only

06:09:28 1 thing that you looked at in your analysis of this case,
06:09:30 2 Mr. Weinstein?

06:09:30 3 A. No. As I testified, I looked at the cost savings
06:09:35 4 benefits. I looked at benefits associated with additional
06:09:39 5 profits on MRDC customers on the assumption that MRDC was
06:09:47 6 table stakes, meaning if you were going to compete with
06:09:51 7 other banks and financial institutions, you simply had to
06:09:55 8 have it.

06:09:57 9 MR. BUNT: Can we go to Slide No. 46, Mr. Huynh?

06:10:05 10 Q. (By Mr. Bunt) Can you remind the jury how you
06:10:07 11 calculated the \$1.2 billion number?

06:10:10 12 A. Yes. I looked at the profits that Wells Fargo made in
06:10:20 13 connection with MRDC customers. I relied on that 3 percent
06:10:27 14 figure that Mr. Hill asked me about. I also relied on the
06:10:30 15 two and a half percent figure that was published in that
06:10:34 16 financial institution publication, Celent, which was not
06:10:41 17 limited to USAA but which was based on a broad survey of
06:10:47 18 banks and financial institutions.

06:10:47 19 So it wasn't just USAA. It was a broad-based
06:10:51 20 survey that showed that that -- that remote scanning simply
06:10:57 21 was not a viable alternative for consumers anymore. But --
06:11:03 22 but mobile deposits were table stakes.

06:11:06 23 Q. Mr. Hill asked you some questions about the Zelle
06:11:09 24 product that Wells Fargo offers. Is it your understanding
06:11:12 25 that Wells Fargo charges USAA's customers when they use the

06:11:16 1 Zelle product?

06:11:17 2 A. Yes, sir.

06:11:17 3 Q. Do you think there's anything unreasonable about USAA
06:11:22 4 wanting to charge Wells Fargo when it's using USAA's
06:11:27 5 property?

06:11:27 6 A. No, I do not.

06:11:29 7 MR. BUNT: Could we turn to Slide No. 48,
06:11:36 8 Mr. Huynh? Actually, I'm sorry, let's go to Slide No. --
06:12:01 9 the last slide in the deck, Mr. Huynh -- or the first one.
06:12:08 10 Yeah, there you go. That's fine.

06:12:10 11 Q. (By Mr. Bunt) Can you remind the jury one more time
06:12:12 12 why is it that you -- well, first of all, how did you come
06:12:15 13 up with this number, the 85 cents per deposit?

06:12:18 14 A. The 85 cents per deposit represents what I believe
06:12:24 15 would be the outcome of that hypothetical negotiation
06:12:26 16 between the parties sitting across the table negotiating
06:12:30 17 for permission to use these patents.

06:12:32 18 I calculated it based on the difference between
06:12:36 19 ATM and mobile deposit costs incurred by Wells Fargo
06:12:40 20 between the period 2014 and 2018 and subtracted EWS fees
06:12:48 21 from that cost, which I understand Wells Fargo incurs.

06:12:51 22 And the final step was to provide Wells Fargo with
06:12:55 23 its return on investment, which allows it to maintain its
06:13:05 24 standard profitability during this period.

06:13:07 25 Q. And, to be clear, the 85 cents per deposit, when you

06:13:11 1 multiply that times the mobile deposits that have taken
06:13:14 2 place during the damage period, it comes up to
06:13:16 3 \$102 million?

06:13:17 4 A. Yes, sir.

06:13:18 5 Q. And why do you think that that is a reasonable approach
06:13:21 6 to calculating damages in this case?

06:13:25 7 A. Well, I think it's reasonable because this invention
06:13:29 8 was table stakes. It was, in fact, disruptive to the
06:13:34 9 industry. The industry is completely different now thanks
06:13:38 10 to mobile deposit from what it was when we just had banks
06:13:43 11 with tellers and ATMs. Mobile deposits, as we've seen,
06:13:50 12 have grown dramatically.

06:13:51 13 It is disruptive, and I believe that \$102 million
06:13:59 14 in the context of the fact that this was table stakes
06:14:06 15 recognized by Wells Fargo as being table stakes is an
06:14:10 16 amount that the parties would have agreed to at that
06:14:13 17 hypothetical negotiation.

06:14:13 18 MR. BUNT: I'll pass the witness.

06:14:14 19 Thank you, sir.

06:14:16 20 THE COURT: Further cross-examination, Mr. Hill?

06:14:17 21 MR. HILL: Yes, Your Honor.

06:14:18 22 THE COURT: Please proceed.

06:14:19 23 MR. HILL: Thank you.

06:14:19 24 RECROSS-EXAMINATION

06:14:20 25 BY MR. HILL:

06:14:20 1 Q. Mr. Weinstein, I heard you say that there were new
06:14:24 2 threats requiring new fraud prevention features, a few
06:14:27 3 minutes ago. Did I hear that correctly?

06:14:28 4 A. You did.

06:14:29 5 Q. I want you to show me where those new fraud prevention
06:14:35 6 features appear in the claims, and I will write them down
06:14:38 7 here. Tell me what they are.

06:14:39 8 A. The threats that I've been testifying about are threats
06:14:48 9 that Wells Fargo recognized in its planning documents.

06:14:50 10 MR. HILL: Objection, nonresponsive, Your Honor.

06:14:52 11 A. They're not in the claims.

06:14:54 12 THE COURT: Overruled.

06:14:57 13 Q. (By Mr. Hill) Okay. They're not in the claims?

06:14:58 14 A. No, they're not in the claims that way. They're in the
06:15:01 15 planning documents. This was a huge impediment to
06:15:06 16 launching a product that was table stakes to Wells Fargo,
06:15:11 17 that was disruptive to the industry. You wouldn't expect
06:15:13 18 to see it described that way in patent claims, but you
06:15:18 19 would expect to see it described that way in planning
06:15:20 20 documents, and that's exactly what we saw.

06:15:24 21 Q. Mr. Weinstein, these new fraud prevention features that
06:15:29 22 you distinguished from ATMs and purport to value are not in
06:15:33 23 the claims; isn't that correct, sir?

06:15:37 24 A. That's probably correct, yes, sir.

06:15:40 25 Q. You mentioned Zelle. USAA customers get a service that

06:15:47 1 cost money when they use Zelle, and they're charged for

06:15:52 2 that service, but they get the benefit of the service.

06:15:55 3 What service do you get from a bare patent license?

06:15:58 4 A. You get the ability to use a table stakes product and

06:16:06 5 compete with the rest of the industry.

06:16:09 6 Q. You get a service?

06:16:13 7 A. Well, I don't know how you -- whether you use the word

06:16:17 8 "service" to describe mobile deposits. You get the ability

06:16:20 9 to have access to -- to that product.

06:16:23 10 Q. I can buy a license to a patent on a system personally,

06:16:28 11 and I still don't own that system, do I?

06:16:30 12 A. That's true.

06:16:31 13 Q. I gotta go build it, right?

06:16:34 14 A. Yes, you need -- you need -- you need to be able to

06:16:39 15 operate the system. That's certainly true.

06:16:41 16 Q. And, finally, Mr. Weinstein, saying something is table

06:16:46 17 stakes does not tell us the economic value of it in the

06:16:52 18 context of the hypothetical negotiation, does it, sir?

06:16:55 19 A. Gives us a big hint.

06:17:00 20 MR. HILL: Pass the witness, Your Honor.

06:17:01 21 THE COURT: Further direct, Mr. Bunt?

06:17:04 22 MR. BUNT: No, Your Honor.

06:17:05 23 THE COURT: All right. You may step down,

06:17:08 24 Mr. Weinstein.

06:17:08 25 THE WITNESS: Thank you, sir.

06:17:14 1 THE COURT: Ladies and gentlemen, we're going to
06:17:15 2 use this juncture to recess for the evening. I'm going to
06:17:19 3 ask you to close your notebooks and take them with you to
06:17:21 4 the jury room, leave them on the table there overnight.

06:17:24 5 Please follow all the instructions I've given you,
06:17:27 6 including, of course, not to discuss the case with anyone
06:17:30 7 or with yourselves. I'll look for you to be back in the
06:17:34 8 morning so that we can start at approximately 8:30.

06:17:36 9 I will do my best to start more promptly tomorrow
06:17:41 10 than I did today. There are things going on that you're
06:17:44 11 not aware of, and they take time. But I'd like to have you
06:17:48 12 back so that we'll be prepared to start about 8:30 in the
06:17:50 13 morning. Travel safely to your homes, have a good evening.
06:17:55 14 And with that, the jury is excused for the evening.

06:17:57 15 COURT SECURITY OFFICER: All rise.

06:17:59 16 (Jury out.)

06:17:59 17 THE COURT: Please be seated.

06:18:16 18 Just leave them there.

06:18:21 19 All right. Counsel, I've given some directives
06:18:30 20 about additional filings, updated joint submissions on the
06:18:36 21 charge and verdict form. I'll look for those as I've
06:18:38 22 indicated. You've asked for the ability to brief some
06:18:42 23 issues. I'll look for those briefs as indicated. I do
06:18:46 24 want to cover one thing with you. Throughout the trial
06:18:49 25 process, and it's a part of every trial process, there are

06:18:53 1 times when the Court needs to communicate with the parties,
06:18:56 2 and that's typically done by an email from one of my law
06:18:59 3 clerks to both sides, that's given at my direction,
06:19:04 4 instructing the parties to either furnish information or to
06:19:06 5 provide materials or to do things that facilitate the trial
06:19:10 6 of the Court and the interaction between the Court and
06:19:13 7 counsel.

06:19:14 8 The email process, from what I've seen, with
06:19:17 9 copies that have been shown to me in this case, seems to
06:19:21 10 have devolved into an opportunity to present ongoing
06:19:25 11 arguments in emails going back and forth to the Court.

06:19:27 12 That's not the purpose of the emails from the
06:19:31 13 Court, and it shouldn't be the purpose of your responses.
06:19:33 14 If there are briefs with arguments in them, file them on
06:19:37 15 the docket or attach them to the emails, but the email
06:19:41 16 traffic is not an appropriate place to present ongoing
06:19:45 17 arguments. We've been getting emails during the course of
06:19:48 18 the trial while people are on the witness stand. That's
06:19:51 19 not appropriate.

06:19:51 20 I'm going to insist that the email process be more
06:19:57 21 respected than it has been. When you get an email from the
06:20:00 22 Court through my staff asking for information, supply that
06:20:04 23 information. Don't supply that information and give me an
06:20:08 24 ongoing argument as to why the information you gave me is
06:20:10 25 right and why the information the other side gave me is

06:20:14 1 wrong. We'll have time to argue both sides of issues, but
06:20:17 2 the email traffic is not the place.

06:20:20 3 Also, I've been meeting with you, as is the
06:20:24 4 Court's practice, each morning before we begin with the
06:20:28 5 jury, in an effort to maximize your designated trial time
06:20:34 6 and allowing an opportunity to hear your arguments and
06:20:37 7 resolve unresolved issues so that time is not wasted when
06:20:41 8 the jury is in the box and we're on the record in open
06:20:44 9 court.

06:20:44 10 To do that, I've been getting copies of slides,
06:20:50 11 demonstratives, other things with competing objections and
06:20:56 12 arguments that I've been addressing with you before
06:20:59 13 beginning each day's trial.

06:21:01 14 Some of those are coming to us in a jumbled order.
06:21:05 15 Some of those are coming to the Court without appropriate
06:21:09 16 numbering so I can follow what your written objections are.
06:21:14 17 I want you to be careful that you give the Court workable,
06:21:17 18 discernible copies. And I want you to do it so that they
06:21:24 19 follow the course and the pattern of the witnesses that are
06:21:26 20 expected to testify.

06:21:27 21 I've been getting materials on people that don't
06:21:30 22 testify until a day or two from when I'm meeting with you.
06:21:35 23 I need to have them staged so that the objections I get and
06:21:39 24 the submissions that you're not able to work out through
06:21:42 25 the meet-and-confer process deal with the witnesses that I

06:21:45 1 can expect to have that day, not the next day or the day
06:21:50 2 after that. That would be very helpful.

06:21:54 3 All right. With that, are there questions from
06:21:58 4 either side before we recess for the evening?

06:22:00 5 MR. SHEASBY: Nothing from Plaintiffs, Your Honor.

06:22:02 6 MR. MELSHEIMER: No, Your Honor. Thank you.

06:22:03 7 THE COURT: I'll be available in the morning as
06:22:05 8 usual.

06:22:05 9 With that, we stand in recess until tomorrow
06:22:08 10 morning.

06:22:08 11 COURT SECURITY OFFICER: All rise.

12 (Recess.)

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1 CERTIFICATION

2
3 I HEREBY CERTIFY that the foregoing is a true and
4 correct transcript from the stenographic notes of the
5 proceedings in the above-entitled matter to the best of my
6 ability.

7
8
9 /S/ Shelly Holmes
10 SHELLY HOLMES, CSR, TCRR
11 OFFICIAL REPORTER
State of Texas No.: 7804
Expiration Date: 12/31/20

1/7/2020
Date

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